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AUTHOR McCarthy, Greg
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ABSTRACT

The handbook provides information on legislation and litigation pertaining to the education of handicapped pupils in South Carolina, required procedures for ensuring due process, and suggestions for procedures to be followed by Hearing Officers prior to, during, and after a hearing. The opening section on state laws includes definitions of handicapping conditions and the amendment to Act 163 of the Education Finance Act of 1977. Summarized are requirements of the following Federal laws and regulations: Public Law 93-380 (the Education Amendments of 1974), Public Law 94-142 (Education for All Handicapped Children Act), Education Division General Administrative Regulations, Section 504 of the Rehabilitation Act, and the Vocational Education Act. Significant court decisions are noted. The section on procedural safeguards includes information on substantive and procedural due process, and details on state procedural safeguards including evaluation, placement, reevaluation, timeliness for LEA (local education agency) procedures, administrative appeal procedures, provisions in regard to surrogate parents and Hearing Officers, and parents' rights. General roles and responsibilities of the Hearing Officer are detailed in a separate section, and this is followed by an explanation of procedures for requesting a hearing, oral notification, written notification, compelling witnesses, opening the hearing, evidence and testimony, issuing a decision, and format for the decision. State Education Association (SEA) appeal procedures are also detailed and cover initiating an appeal, SEA responsibilities, responsibilities of the SEA Hearing Officer, and procedures prior to, during, and subsequent to a hearing. Charts of the procedure sequence, forms, sample letters, and sample subpoenas are appended. (DB)

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A HANDBOOK FOR HEARING OFFICERS

South Carolina Department of Education
An Equal Opportunity Agency
Dr. Charlie G. Williams, State Superintendent
Revised 1995

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South Carolina Department of Education: An Equal Opportunity Agency
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Revised 1987

A HANDBOOK FOR HEARING OFFICERS

Developed by:
Mary Ginn
Ellen Carruth
Revised by:
Greg McCarthy

Robert S. Black, Director
Office of Programs for the Handicapped

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INTRODUCTION

Public Law 93-380 established the authority for impartial Hearing Officers to conduct hearings at the local level when parents of handicapped children and the local educational agency disagree in matters pertaining to evaluation, placement, changes in educational placement and accuracy of educational records. Similarly, Public Law 94-142 accords parents, local educational agencies or other state agencies the right to an appeal to the State educational agency when either party disagrees with the decision of the Hearing Officer following a hearing conducted at the local level. Through the annual submission and subsequent approval of its **State Plan for Part B of the Education of the Handicapped Act as Amended by P.L. 94-142,** the South Carolina Department of Education has the responsibility for training these Hearing Officers.

Those persons serving as Hearing Officers in the State are dedicated volunteers who give freely of their time and services to ensure that the rights of handicapped children and their parents, as well as the rights of the local school districts or other State agencies providing educational services to these children, are protected in accordance with the provisions of the law. The decisions rendered in these matters impinge significantly upon the lives of handicapped pupils throughout the State.

This publication was developed for the purpose of providing information relative to legislation and litigation pertaining to the education of handicapped pupils, the procedures for ensuring "due process" developed by the South Carolina Department of Education and approved by the Office of Special Education, and to suggest procedures to be followed by a Hearing Officer prior to, during, and after a hearing. This current revision of the manual incorporates much of the information contained in the previous edition, as well as some significant changes in procedures and policies. The Department is hopeful that this publication will be helpful to Hearing Officers in fulfilling their responsibilities.

The participation of Mrs. Helen Stuart, former member of the State Education Agency Advisory Council on Programs for the Handicapped and a state level Hearing Officer, and Mr. Paul League, former Assistant Attorney General of South Carolina, in reviewing and making recommendations for the manual is greatly appreciated.

UNIT 1
Laws/Litigation Pertaining to the Handicapped

STATE LAWS

In February of 1972, the South Carolina Legislature passed an act, "to provide for the mandatory establishment of educational and training services and facilities for handicapped children in the public schools ... who cannot be trained adequately without special educational facilities and services." (§59-33-10, **South Carolina Code of Laws,** as amended). Further, the State Board of Education was authorized to establish special programs in the State and to have jurisdiction over the kinds and types of services and facilities provided for screening, evaluating, and placing pupils in programs for the handicapped. Each school district or group of districts was charged with the requirement of conducting a survey of the educational needs of its handicapped pupils and developing an educational plan for these pupils. This plan specifies the provision of instruction through resource, itinerant, and self-contained programs, or other models approved by the State Department of Education. §59-33-30 and §59-33-40, South Carolina Code). Pupils (both handicapped and non-handicapped) eligible for public school services in South Carolina are those between the ages of five (5) and twenty-one (21). The legal school age for hearing and visually handicapped pupils, however, is four (4) years of age.

Definitions of Handicapping Conditions

Section 59-21-510 of the 1976 Code, as amended, provides for the following defintions of handicapping conditions:

"Educable mentally handicapped pupils" means pupils of legal school age whose intellectual limitations require special classes or specialized education instruction to make them economically useful and socially adjusted;

"Trainable mentally handicapped pupils" means pupils of legal school age whose mental capacity is below that of those considered educable, yet who may profit by a special type of training to the extent that they may become more nearly self-sufficient and less burdensome to others;

"Emotionally handicapped pupils" means pupils of legal school age with demonstrably adequate intellectual potential, who because of emotional, motivational, or social disturbance require special classes or specialized education instruction suited to their needs;

"Hearing handicapped pupils" means pupils of age four (4) or older who are certified by a licensed specialist that their hearing deficit requires special classes or specialized education instruction suited to their needs;

"Orthopedically handicapped pupils" means pupils of legal school age who have an impairment which interferes with the normal functions of the bones, joints, or muscles to such an extent and degree as to require the school to provide special facilities and instructional programs;

"Physically handicapped children" means children of sound mind and of legal school age who suffer from any disability making it impracticable or impossible for them to benefit from or participate in the normal classroom program of the public schools;

"Visually handicapped pupils" means pupils "age four or older who are blind or possess a severe visual disability as defined in §43-25-20."

In 1976 the State Board of Education promulgated rules and regulations for the evaluation and placement of handicapped children in **Procedures for Survey, Screening, Evaluation, Placement,**

and Dismissal of Children Into/Out of Programs for the Handicapped. This document defines "Speech and Language Handicapped" as the following:

> Speech and language handicaps are those disorders which tend to interfere with or limit, to varying degrees, the individual's ability to formulate, express, receive or interpret oral language. Speech and language handicaps may be manifested in degrees of mild, moderate or severe and be exhibited as disorders of articulation, voice, rhythm, language, delayed speech and language, and speech/language disorders associated with cleft palate, cerebral palsy conditions, or hearing loss. Speech and language behavior, associated with dialectal differences, may indicate a need for the availability of appropriate services, optional for pupil participation.

The definition for learning disabled pupils was published in the **Federal Register,** Volume 42, Number 250, on December 29, 1977 and was incorporated into the updated version (Spring 1978) of the **Procedures for Survey, Screening, Evaluation, Placement, and Dismissal of Children Into/Out of Programs for the Handicapped.** It reads as follows:

> "Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain disfunction, dyslexia, and developmental aphasia. The term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

In December of 1979, the State Board of Education adopted regulations to establish a category for Profoundly Mentally Handicapped. These regulations became effective on April 7, 1980 and were subsequently published as Final Regulations in the April 18, 1980 **State Register.** As defined, "profoundly mentally handicapped" means pupils of legal school age whose mental capacity is below that of those considered "trainable mentally handicapped", yet who may profit by a special type of education/training which includes self-help skills, motoric development, social and communicative skills in order that they may become more self-sufficient."

Amendment to Act 163 of the Education Finance Act of 1977

An amendment to the Education Finance Act was enacted by the General Assembly in June of 1980. The components relating to programs for handicapped children are as follows:

(1) All school districts providing educational services to children admitted or committed to residential institutions of the Department of Mental Health are authorized to count children admitted or committed to residential institutions of the Department of Mental Health from the first day of residency in such institutions, provided, that the first day is within the particular district's school year. The inclusion of these children is for the purpose of participation in the district's educational programs for handicapped children supported under the **Education Finance Act** of South Carolina.
(2) Duly appointed hearing officers of local school districts and other state operated programs shall have the power of subpoena consistent with the requirements and regulations of Public Law 94-142.
(3) Regarding handicapped children placed in programs for non-educational reasons:

   (a) No agency of the State shall place handicapped children of lawful school age in residential, institutional or foster home settings without insuring that such children shall have available to them a free and appropriate public education.
   (b) In placing children determined to be handicapped by State Board of Education criteria, state agencies must procure, except in emergency situations, advance approval by the State De-

partment of Education. The Department shall insure that an appropriate Individualized Education Program shall be developed by the pupil's home school district and that the proposed educational placement meets all the provisions of Public Law 94-142.

FEDERAL LAWS

The litigation of the 1970's revealed that decisions regarding the identification, evaluation and placement of handicapped children for education in the public schools were frequently made arbitrarily, with little supporting data and as a matter of administrative convenience. Sometimes children were placed in programs for the handicapped without parental involvement. These practices were remedied with the establishment of due process requirements as a result of the 1972 Pennsylvania Association for Retarded Children consent agreement which was entrenched in the Fifth and Fourteenth Amendments of the United States Constitution. The fourteenth Amendment provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law."

Public Law 93-380

Public Law 93-380, the Education Amendments of 1974, contained requirements for the education of the handicapped which had to be addressed by both State and local education agencies. Through the **Annual Program Plan and the State Plan Amendment for FY 1975 Under Part B of the Education of the Handicapped Act as Amended by P.L. 93-380** and **The Annual Program Plan and the State Plan Amendment for Fiscal Year 1976 Under Part B of the Education of the Handicapped Act as Amended by P.L. 93-380**, the following requirements of the Law were addressed by the State Department of Education:

1. Least restrictive educational environment, which provides for the education of handicapped children with non-handicapped to the greatest extent practicable.
2. Procedural due process, which insures equal protection under the law to handicapped children, their parents and the public schools.
3. Non-biased evaluation, which provides that testing and evaluation materials and procedures used for the classification and placement of handicapped pupils be selected and administered so as not to be culturally or racially discriminatory.
4. Confidentiality, which insures the protection of the rights and privacy of parents and handicapped pupils. (Detailed information relative to implementing the requirements of least restrictive environment, non-biased evaluation and confidentiality is included in South Carolina's **Fiscal Year 1981-1983 State Plan for Part B of the Education of the Handicapped Act as Amended by P.L. 94-142**. Due process is addressed in the main text).

Public Law 94-142

Public Law 94-142, the Education for all Handicapped Children Act, is often referred to as the "Bill of Rights for Handicapped Children." Signed into Law on November 29, 1975, the Act not only includes the basic tenets of Public Law 93-380, but also extends the legislation to include a more comprehensive plan for the education of all children with handicaps. This theme is reflected in the following statement of purpose from the final regulations for the implementation of Public Law 94-142, as contained in the **Federal Register**, Volume 42, Number 163, August 23, 1977:

"(a) To insure that all handicapped children have available to them a free appropriate public education which includes special education and related services to meet their unique needs.
(b) To insure that the rights of handicapped children and their parents are protected.
(c) To assist States and localities to provide for the education of all handicapped children, and
(d) To assess and insure the effectiveness of efforts to educate those children." (§300.1)

Although not a component of P.L. 93-380 but required under P.L. 94-142, the Individualized Education Program or IEP is defined as a "written statement for each handicapped child developed in any meeting by a representative of the local education agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children . . ." (§602(19))

Persons responsible for the development of the IEP include:

1. A representative of the local education agency or private school.
2. The pupil's classroom teacher.
3. The parent(s) or surrogate.
4. The pupil, where appropriate.
5. Other persons who may contribute meaningful information.

Additionally, Public Law 94-142 requires that a member of the evaluation team or a person knowledgeable about the evaluation procedures and results of the evaluation be present at the meeting to develop the IEP when the pupil has been evaluated for the first time. Any of the persons cited above may be utilized for this purpose, if feasible.

The law requires that the local education agency "provide assurances that the local educational agency or intermediate educational unit will establish, or revise, whichever is appropriate, an individualized education program of each handicapped child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually." (§614(a)(5)). (Detailed information relative to IEPs is included in **State Board of Education Regulation 43-243).**

Final regulations for the implementation of Public Law 94-142, as promulgated by the United States Office of Education, Bureau of Education for the Handicapped, require that the State Education Agency shall:

"(a) Undertake monitoring and evaluation activities to insure compliance of all public agencies within the state with the requirements of Subparts C, D, and E," (i.e., Services, Private Schools, Procedural Safeguards).
"(b) Develop procedures (including specific timelines) for monitoring and evaluating public agencies involved in the education of handicapped children. These procedures must include:

(1) Collection of data and reports;
(2) Conduct of on-site visits;
(3) Audit of Federal fund utilization; and
(4) Comparison of a sampling of individualized education programs with the programs actually provided." (§300a.601)

On an annual basis, the State Education Agency conducts site monitoring visits of local education agencies, state operated programs and organizations providing educational services to handicapped pupils to insure compliance with the provisions of the Act.

Education Department General Administrative Regulations

The Education Department General Administrative Regulations were published as final regulations in the **Federal Register** on July 1, 1985. These regulations, whose statutory authority is the General Education Provisions Act, apply to all education programs receiving federal monies. The portion of these regulations impinging most significantly upon programs for handicapped pupils concerns the participation of students enrolled in private schools. The regulations require that the program benefits or services that a school district provides for pupils enrolled in private schools must be comparable in quality, scope and opportunity for participation to the services provided for public school pupils. (§76.654)

Section 504 of the Rehabilitation Act

In September 1973, the Rehabilitation Act of 1973 (Public Law 93-112) was passed by Congress and signed by the President. Subsequently, the final regulations for the implementation of this Act were published in the **Federal Register**, Volume 42, Number 86, May 4, 1977. Designed to eliminate discrimination on the basis of handicaps in any program or activity receiving Federal financial assistance, this Act was, essentially, the first Federal civil rights law protecting the rights of handicapped persons.

Subpart D of the Act, which relates to preschool, elementary and secondary education, closely parallels the requirements of Public Law 94-142 in that 1) a free appropriate public education must be provided to all qualified handicapped persons, 2) non-biased evaluation procedures must be utilized for classification and placement, 3) the least restrictive alternative must be utilized for the placement of handicapped pupils, and 4) procedural safeguards must be assured. Section 84.3(k)(2) of the final regulations states that "a qualified handicapped person means: . . . with respect to public preschool, elementary, secondary, or adult educational services, a handicapped person of an age during which nonhandicapped persons are provided such services, of any age during which it is mandatory under state law to provide such services to handicapped persons, or to whom a state is required to provide a free appropriate public education under §612 of the Education of the Handicapped Act. . ."

Although the Individualized Education Program is not specifically required under Section 504 of the Act, it is one means of meeting the standards established for a free appropriate public education.

Compliance with the components of Public Law 94-142 is required if states expect to receive any of the funds appropriated under the Act. Any recipient of "federal financial assistance" from the Department of Health and Human Services, formerly the Department of Health, Education and Welfare, however, must be in compliance with Section 504 even though there are no federal monies authorized in the Rehabilitation Act. Federal financial assistance includes any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

(1) Funds;
(2) Services of Federal personnel; or
(3) Real and personal property or any interest in or use of such property . . ." (§104.3)

This includes, for example, universities, local school districts, daycare centers and hospitals.

Public Law 98-524 (Vocational Education Act of 1984)

The reauthorization of the Vocational Education Act, known as the Carl D. Perkins Vocational Education Act, was signed on October 19, 1984. Subsequently, the final regulations for the implementation of this Act were published in the *Federal Register*, Volume 50, Number 159, Friday, August 16, 1985. The Act includes the following provisions which have implications for handicapped pupils:

(1) The provision that 10 percent of a state's formula grant allotment be used to provide vocational education services to handicapped pupils is maintained. The 1:1 state/local to federal dollar matching requirement is maintained. The excess cost provision is maintained and is now a statute (previously a regulation only). Federal funds may only be used for 50 percent of the expenses associated with educating a handicapped pupil that are over and above the cost of educating a non-handicapped pupil in vocational educaton. State and local funds are used to provide the basic cost of vocational education as well as at least 50 percent of the excess cost of educating a pupil with handicaps.
(2) The Act assures that the rights and protections under Public Law 94-142 are extended to pupils with handicaps in vocational education.
(3) Local education agencies are required to collect more extensive data on the quality of the vocational education provided to handicapped pupils.
(4) Information will be provided to handicapped pupils and parents concerning vocational education opportunities one year prior to a handicapped pupil's enrollment in the ninth grade.
(5) Each handicapped pupil enrolled in a vocational education program shall receive:
   — an assessment of interests, abilities and special needs with respect to vocational education;
   — special services to include adaptation of curriculum, instruction, equipment and facilties, if necessary;
   — guidance, counseling and career development services; and
   — counseling services to facilitate the transition from school to post-school employment and career opportunities.

Public Law 99-372 (Handicapped Children's Protection Act of 1986 — Attorney's Fees Bill)

The Handicapped Children's Protection Act of 1986, Public Law 99-372, commonly referred to as the Attorney's Fees Bill, was signed into law on August 5, 1986. The Act was originally designed to permit parents who prevail in Public Law 94-142 cases to recover attorney's fees. The major tenets of the Act include:

(1) In any action or proceeding brought under the Act, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party.
(2) The Act mandates a GAO study of the impact of the ACT, including the collection of information regarding the amount of funds expended by LEAs and SEAs on civil actions and administrative proceedings.
(3) In cases where parents first exhaust administrative remedies under Public Law 94-142, the Act authorizes the filing of civil actions under other laws.
(4) The report emphasizes that public access to hearing decisions is existing law.
(5) The Act is retroactive to all cases pending as of July 3, 1984 or decided between July 4, 1984 and the date of passage.

Significant Court Decisions

The Office of Programs for the Handicapped of the South Carolina Department of Education disseminates four (4) reports a year dealing with recent federal or state court decisions which affect the education of handicapped children. All local school districts receive copies of these reports and should ensure that the hearing officers also receive copies of them. Copies of these reports are available upon request from the Office of Programs for the Handicapped.

UNIT II
Procedural Safeguards

The concept of "due process" encompasses the protection of an individual's rights with respect to both "substance" and "procedure."

1. Substantive Due Process

   In matters pertaining to the education of the handicapped, substantive due process relates to the requirement of law that a free, appropriate public education be provided for all handicapped children. Additionally, substantive due process involves the aspects of law inherent to assuring a free, appropriate education, i.e., proper evaluation and placement, development of an appropriate Individualized Education Plan (IEP), reevaluation at specified intervals, etc.

2. Procedural Due Process

   Procedural due process relates to the procedures and time lines which must be adhered to in the evaluation and placement of pupils, in obtaining written parent permission prior to evaluation and placement, in invoking hearing procedures when the parent and local education agency (LEA) disagree in matters of a substantive nature, and in invoking appeal procedures when the parent/LEA disagree with the findings and decisions in hearings conducted at the local level.

Public Law 94-142 requires states to develop procedures for conducting due process hearings at the local level. Similarly, states are required to develop procedures for conducting appeals at the state level when parents/LEA do not agree with the decision of the LEA hearing officer. The South Carolina Department of Education has developed State Board of Education Regulations consistent with Federal Regulations promulgated by the Office of Special Education of the United States Office of Education to protect the rights of handicapped children and their parents.

I. EXPLANATION OF TERMS

A. **Due Process.** This term means "notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case. The guarantee of 'due process' requires that every man have protection of day in court and benefit of general law."[1]

B. **Parent.** For the purpose of this section, the term "parent" includes a natural mother or father, an adoptive mother or father, a legally appointed guardian, a surrogate parent for a child appointed pursuant to procedures outlined herein.

C. **Surrogate Parent.** A "surrogate parent" is a person appointed to act in place of parents or guardians when a child's parents or guardians are not known, cannot be located, or the child is a ward of the state. Surrogate parents will not be employees of the State education agency (SEA), local education agency (LEA) or agency involved in the education or care of the child. The function of the surrogate parent shall be to represent the child's interest in the same way that a parent or guardian would be expected to represent the child's interest. (Reference page 19.)

D. **Notification.** In all procedures regarding evaluation, placement, the provision of a free appropriate public education and due process, terms such as "notice" and "notification" shall mean (1) written statement in the primary language of the home, and (2) oral communication in the primary language of the home, unless it is clearly not feasible to do so.

[1]**Dimke v. Finke,** 209 Minn., 29 295 N.W. 75, 79.

Notification to parents must be provided in common understandable language. In cases where the native language of the parents is not written or the parents are otherwise unable to communicate through normal channels, the LEA must provide for an interpreter. Additionally, there must be written documentation that the parent understands the notice.

In due process procedures regarding evaluation, placement or other aspects of the provision of a free appropriate public education, the initial written notification to parents from the LEA/agency may be by regular mail. If parents fail to reply, subsequent notification shall be provided by registered or certified mail.

In matters pertaining specifically to due process hearings, written notification from a hearing officer shall be provided to both parties by means of registered or certified mail, return receipt requested.

Notification must be provided to parents by the LEA/agency prior to initiating or changing the identification, evaluation, educational placement, or the provision of a free appropriate public education. Similarly, notification must be provided to parents when the LEA/agency refuses to initiate or change the identification, evaluation, educational placement or the provision of a free appropriate public education.

Notification must also be provided to parents when personally identifiable information is no longer required for the provision of educational services to children and prior to the destruction of such data.

E. **Independent Educational Evaluation.** An independent evaluation is conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question. Local education agencies and participating agencies must inform parents of their right to obtain an independent evaluation and provide, upon request, a list of places where a parent may obtain an independent evaluation. In matters pertaining to independent evaluations, the following regulations must be adhered to:

(1) When a parent requests an independent evaluation at public expense, the LEA/agency may initiate a hearing to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has the right to obtain an independent educational evaluation, but not at public expense.

(2) If the parent obtains an independent educational evaluation at private expense, the results of the evaluation must be considered by the LEA/agency in any decision made with respect to the provision of a free appropriate public education to the child, and may be presented as evidence at a hearing regarding the child.

(3) If a hearing officer requests an independent evaluation as part of the hearing, the cost of the evaluation must be at public expense.

(4) Whenever an independent evaluation is conducted at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria which the LEA/agency uses when it initiates an evaluation.

F. **Parental Consent.** Written parental consent must be obtained prior to:

(1) conducting a preplacement evaluation;

(2) initial placement of a handicapped child in a program providing special education and related services;

(3) any change in educational placement following initial placement (with the exception of pupil dismissal, which requires parent notification and the opportunity for input into the decision);

(4) disclosing personally identifiable information to anyone other than authorized employees of the public agency, the SEA, and LEAs. Parental consent for the actions previously noted must be based upon "informed consent." In cases where a parent refuses consent, a public agency may invoke a due process hearing to determine if a child may be evaluated or initially provided special education and related services without parental consent.

Except before preplacement evaluation and initial placement into a special education program, benefits to handicapped children cannot be denied to the child on the basis that parental consent is absent.

G. **Impartial Hearing Officer.** The term "impartial hearing officer" means a person or tribunal of persons assigned by the local education agency for due process hearings. It is the hearing officer's duty to assure that proper procedures are followed and that the rights of the parties are protected. (Reference page 22.) An impartial hearing officer must be:

(1) Unbiased—not prejudiced for or against any party involved in the hearing;
(2) Disinterested—not having any personal interest at stake in the outcome;
(3) Independent—may not be an officer, employee or agent of the LEA/agency involved in the education or care of the child.

H. **Days.** Consistent with the policy of the Office of Special Education (OSE), days, as used herein, shall mean "calendar" days.

II. PROCEDURES FOR EVALUATION

A. Evaluations initiated by the LEA/agency

(1) Prior to conducting a preplacement evaluation, the LEA/agency shall request parental permission for the proposed action through written notification. The notification must include the following information:

(a) the reasons for the requested evaluation and the name of the person who initiated the process;
(b) the proposed evaluation procedures;
(c) a statement that after obtaining parent permission for evaluation or the decision of a hearing officer following a due process hearing (subject only to SEA appeal), the evaluation will be completed. A statement that the parents will be informed of the evaluation schedule must be included. (Notice should be provided at least nine (9) calendar days prior to the evaluation);

(d) a description of the testing procedures and instruments to be utilized and the limitations of the instruments;
(e) a description of how the findings of the evaluation will be used;
(f) a statement that the parents will be informed of the results of the evaluation;

(g) a description of all procedural safeguards available;
(h) a statement of the parents' right to refuse permission for the evaluation, with the understanding that the LEA/agency can request a hearing to present its reasons and try to obtain approval to conduct the evaluation;
(i) an explanation of other rights pertaining to the evaluation process (Reference Appendix C of this part);
(j) a list of the sources whereby a parent may obtain free/low cost legal services;
(k) a declaration that the child's educational status shall not be changed without the knowledge and written approval of the parent, or until the notice and due process procedures have been exhausted;
(l) a statement of any other factors relevant to the proposed action.

(2) After obtaining parent permission for evaluation or following a decision by a hearing officer (subject only to SEA appeal), the evaluation must be completed. Parents must be notified of the evaluation schedule. (Notice should be provided at least nine (9) calendar days prior to the evaluation).

(3) Following evaluation, the LEA/agency shall notify the parents that the evaluation has been completed. The notice shall include the following, with the exception of the items specified herein which are pertinent to both permission for evaluation and placement:

(a) the results of the evaluation and the educational implications;
(b) a statement of the parents' right to attend a meeting of the staffing/placement committee. (The meeting should be conducted within fourteen (14) calendar days after notifying parents of the schedule.)
(c) a statement of the parents' right to refuse permission for placement, with the understanding that the LEA/agency can request a due process hearing to present its reasons and try to obtain approval for placement;
(d) an explanation of other rights pertaining to the placement process (Reference Appendix C of this part);
(e) a full description of all procedural safeguards available;
(f) a declaration that the child's educational status shall not be changed without the knowledge and written approval of the parent, or until the notice and due process procedures have been exhausted;
(g) a list of the sources whereby a parent may obtain free/low cost legal services;
(h) a statement of any other factors relevant to the proposed action.

B. Evaluations denied by LEA

(1) Written notice must be provided to parents when the LEA/agency refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate education to the child. The notice must include the following:

(a) a description of the action refused by the LEA/agency,
(b) an explanation of the reasons for refusing to carry out the requested action,
(c) a description of any options considered and the reasons for rejecting these options,
(d) a statement of the parents' right to request a due process hearing and a full description of the procedural safeguards available,
(e) a description of any other factors relevant to the action.

III. PROCEDURES FOR PLACEMENT

A. Placement initiated by the LEA/agency

(1) Following notification of the completion of the evaluation and schedule for the staffing as outlined in Section II-A (3)(b) of this part, the staffing/placement committee will meet.

(2) Within thirty (30) calendar days after determining a child's need for special education and related services, a meeting to formulate an individualized education program (IEP) will be conducted. LEAs/agencies must provide an opportunity for parents to participate through a notice which:

(a) includes a statement of the parents' right to participate in the development of the IEP meeting;
(b) indicates the purpose, time, date, location and the persons anticipated to be in attendance;
(c) provides the parents an opportunity to have the meeting rescheduled at a time, date or location reasonably convenient to the parents in the event the time, date or location of the meeting prohibits the parents' attendance; (In cases where parents cannot attend, other methods such as individual or conference calls, home visits, etc., shall be employed to insure parent participation.)
(d) a statement of the parents' right to obtain a copy of the IEP;
(e) a statement of any other factors relevant to the proposed action.

(3) Subsequent to the IEP meeting (or a follow-up conducted after the IEP meeting if parents were not in attendance), the LEA/agency shall request parent permission for placement of the child.

(4) Subsequent to obtaining parent permission or following the decision of a hearing officer (subject only to SEA appeal), the child will be placed.

B. Placement denied by LEA

(1) Written notice must be provided to parents when the LEA/agency refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate education to the child. The notice must include the following:

(a) a description of the action refused by the LEA/agency,
(b) an explanation of the reasons for refusing to carry out the requested action,
(c) a description of any options considered and the reasons for rejecting these options,
(d) a statement of the parents' right to request a due process hearing and a full description of the procedural safeguards available;
(e) a description of any other factors relevant to the action.

IV. PROCEDURES FOR REEVALUATION

A. The LEA/agency shall notify parents prior to conducting a meeting to review the IEP and prior to reevaluating a pupil.

B. The notice shall be consistent with the contents and time lines for notification described in Section II-A (1)-(3) and Section III-A of this part, where applicable and appropriate.

V. DUE PROCESS HEARINGS

A. A parent or an LEA/agency may initiate a hearing (to be conducted by the public agency responsible for the child's education) regarding the proposed/refused identification, evaluation or educational placement of the child or the provision of a free appropriate public education to the child. A hearing may also be initiated on matters described in the Confidentiality Guidelines.

When a handicapped child is placed in a public agency not having educational responsibility and a due process hearing becomes necessary, the hearing shall be the responsibility of the pupil's home district and shall be conducted in accordance with the procedures herein. All hearings at the local level or in all other agencies shall be consistent with due process procedures approved by the State Board of Education and/or Federal regulations. All state appeals, regardless of service delivery organization, shall be conducted through the State educational agency.

(1) When such a hearing is initiated by the LEA, the LEA shall notify the parents by registered/certified mail on the same day as a request for the hearing is filed with a hearing officer. The notice shall include:

(a) a copy of the original notice requesting permission for the proposed action;
(b) a statement that school files, reports and records pertaining to the child shall be available for inspection and copying, subject to the requirements of Confidentiality Guidelines;
(c) a detailed description of all the rights regarding procedures at the due process hearing (Reference Section V-B(2)(a)(b)(c) of this part);
(d) a list of those agencies in the community where free/low cost legal services are available;
(e) a statement of the parents' right to an appeal of the decision resulting from the due process hearing.

(2) If parents initiate a hearing, the LEA must submit the request to a hearing officer within ten (10) calendar days after receiving the request.

B. **Procedures prior to a hearing.** Prior to the holding of a due process hearing, the following shall occur:

(1) Prior notice, as described in Section V-A(1) of this part, will be provided to the parents.

(2) Within five (5) calendar days after receiving a request for a hearing, the hearing officer will notify the parties as to the time, date and location of the hearing. The notification should be provided twenty (20) calendar days prior to the scheduled date of the hearing and should be conducted at a time, date, and a location reasonably convenient to the parents.

(a) The notice shall inform parties of their right to:

(i) be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children;

(ii) present evidence and confront, cross-examine, and compel the attendance of witnesses;
(iii) prohibit the introduction of any evidence that has not been disclosed to the other party at least five (5) calendar days prior to the hearing;
(iv) obtain written or electronic verbatim record of the hearing; (The LEA may utilize the guidelines established for use by the SEA in Section VI-E(4) of this part or establish any guidelines which do not conflict with federal regulations.)
(v) obtain written findings of fact and decisions.

(b) The notice shall inform parents of their right to:

(i) have the child who is the subject of the hearing present during the hearing.
(ii) open the hearing to the public. (Hearings will be closed unless otherwise requested by parents.)

(c) The notice should include a statement that during the pendency of the proceeding, the child will remain in the present educational placement unless both parties agree otherwise. When the proceedings involve initial admission to public school, the child with the consent of the parents, must be placed in the public school program until completion of all the proceedings.

C. **Procedures During the Hearing.** A due process hearing shall be conducted in accordance with the following:

(1) Within forty-five (45) calendar days after the LEA receives a request for or initiates a due process hearing, a final decision must be reached and the parties must be notified in accordance with Section V-D of this part. The hearing officer, however, may grant specific extensions of time beyond the periods set forth in Section V-B(2) of this part.

(2) The hearing officer shall preside at the hearing and shall conduct the proceedings in a fair and impartial manner. All the parties involved in the hearing shall have an opportunity to present evidence and testimony.

(3) The parent and the local education agency may have legal counsel and witnesses present at the hearing.

(4) The hearing shall be closed to the public unless the parent requests an open hearing.

(5) The parent and the local education agency and their respective representatives shall have the right to present evidence and testimony.

(6) The parent and the local education agency and their respective representatives shall have an opportunity to confront and question all witnesses at the hearing.

(7) A tape recording or other verbatim record of the hearing shall be made.

(8) Interpretations shall be provided at public expense, as warranted, for persons whose primary language is other than English, or for persons who are unable to communicate through normal modalities.

D. **Decision of the Hearing Officer.** Within five (5) calendar days after the hearing, the hearing officer shall issue a decision in accordance with the following requirements:

(1) The decision shall be in writing and shall be transmitted by registered/certified mail to the parent/surrogate and to the local education agency. The provision of copies of the decision to other participants is not mandatory. (A copy of the decision must also be submitted to the SEA.)

(2) The decision of the hearing officer shall include findings of fact, conclusions, and reasons for these findings and conclusions. The decision shall either approve or disapprove the proposed evaluation, placement, or change in placement or action in question.

(3) The hearing officer shall make an independent decision based solely on evidence and testimony presented at the hearing.

(4) A copy of the tape recording or other verbatim record of the hearing shall be provided upon request of the parent in accordance with Section V-B(2)(a)(iv) of this part.

(5) The decision of the hearing officer shall include a statement of both parties' right to an appeal. (Reference Section VI of this part.)

(6) If either party disagrees with the decision of a hearing officer following a due process hearing, an SEA appeal may be initiated within ten (10) calendar days of receiving notice of the decision. (The decision of the hearing officer is binding on all parties and any action directed by the hearing officer must be initiated immediately unless an appeal is filed.)

(a) An appeal directed to the SEA must be in written form. (If parents are unable to communicate through written notice, the LEA must provide assistance in this regard.)

(b) An appeal submitted to the SEA must include an electronic verbatim or written transcript. If an electronic verbatim transcript is of such poor quality that the SEA hearing officer would be effectively prevented from conducting the review, the SEA hearing officer may request a written transcript. (A request for a specific extension of the timelines set forth in Section VI-B and VI-C of this part may be granted by the hearing officer in order for a written transcript to be completed.)

(c) An appeal must include a statement of the decision following the LEA hearing, the specific points being appealed, copies of all items entered as evidence, and the name and address of the parents if the LEA is appealing the decision. The appellant may also include written argument.

(d) Any party (LEA/SOP or parent) filing an appeal with the SEA must notify the other party of such and provide a copy of the appeal, including written arguments, to the other party.

VI. ADMINISTRATIVE APPEAL/IMPARTIAL REVIEW

A. An appeal (subject to the requirements of Section V-D(6)(a)(b)(c)(d) of this part) may be initiated by either party (LEA/agency or parent) to the SEA for an impartial review of the decision resulting from a due process hearing at the local level within ten (10) calendar days after the decision is rendered and received. The State Level Administrative Reviewing Officer has the authority to grant a request for a specific extension of time in which to file a written administrative review request. A request for an extension of time in which to file an administrative review (beyond the ten (10) day time limit) will be made in writing to the Director of the Office of Programs for the Handicapped, who will submit such request to the State Level Administrative Reviewing Officer within five (5) working days. Within ten (10) working days of receiving a request for an extension of time for filing an administrative review request, the State Level Reviewing Officer may grant such a request for good cause shown. "Good cause" is not exhaustible; however, good cause shall not include negligence or a matter of low priority in filing the request for a review. In no event will the State Level Reviewing Officer grant an extension of more than twenty (20) days beyond the original ten (10) day timeline.

B. Within thirty (30) calendar days after the SEA receives an appeal, a final decision must be

issued in accordance with Section VI-E and F of this part. The hearing officer, however, may grant specific extensions of time beyond the periods set forth in Section VI of this part at the request of either party. Any extension requested shall be documented and shall clearly set forth just cause for the extension; further, any extension granted shall be only for a reasonable length of time.

C. An appeal to the SEA will be transmitted to a hearing officer after it is received. Simultaneously, a notice will be submitted to both parties acknowledging receipt of the appeal, providing the name and address of the SEA Hearing Officer and informing both parties that written argument may be submitted to the hearing officer. (Either party submitting written argument to the hearing officer must simultaneously provide this information to the other party involved.)

D. Within nine (9) calendar days of receiving the appeal, the SEA Hearing Officer shall:

(1) Examine the entire hearing record (written/electronic transcript, etc.).

(2) Insure that the LEA Hearing was conducted consistent with due process procedures.

(3) Review any written argument submitted by either party.

(4) Determine the need for a hearing to afford parties an opportunity to present oral argument and/or to seek additional information.

(a) When the hearing officer determines that no basis exists for admitting oral argument or for conducting a hearing to receive additional evidence, the decision shall be issued.

(b) When the hearing officer determines the need for a hearing to receive oral argument and/or to receive additional information, parties will be notified that such action shall take place ten (10) calendar days following their receipt of the notice. The notice should:

(i) Specify the date, time and location of the hearing, which shall be reasonably convenient to all parties.

(ii) Provide a description of the rights of the parties as set forth in Section V-B(2)(a)(b)(c), of this part.

E. After receiving the appeal, the SEA Hearing Officer shall:

(1) Examine the entire hearing record (written/electronic transcript, etc.).

(2) Insure that the LEA Hearing was conducted consistent with due process procedures.

(3) Review any written argument submitted by either party.

(4) Determine the need for a hearing to afford parties an opportunity to present oral argument and/or to seek additional information.

(a) When the hearing officer determines that no basis exists for admitting oral argument or for conducting a hearing to receive additional evidence, the decision shall be issued.

(b) When the hearing officer determines the need for a hearing to receive oral argument and/or to receive additional information, parties will be notified that such action shall take place ten (10) calendar days following their receipt of the notice. The notice should:

(i) Specify the date, time and location of the hearing, which shall be reasonably convenient to all parties.

(ii) Provide a description of the rights of the parties as set forth in Section V-B(2)(a)(b)(c), of this part.

E. Following a hearing, the hearing officer shall:

(1) make an independent decision based solely on evidence and testimony presented at the hearing;

(2) notify the parties of the decision;

(3) provide a copy of written findings to the parties;

(4) inform the parties (if a hearing was conducted) of their right to obtain a written or electronic verbatim record of the hearing, in accordance with the following:

(a) An electronic verbatim record will be provided to parties upon request, subject to a charge for the actual cost of the tapes, unless such a charge would effectively prevent the parties from exercising their right to obtain such record. (Parties as used here means parents/surrogates and administrative officers of the service delivery unit.)

(b) A written verbatim record will be provided, upon request by the parties, if failure to provide a written verbatim record would effectively prevent the parties from exercising their right, i.e., the electronic record is of extremely poor quality, the party requesting a written record is deaf or hard-of-hearing, etc. A fee may also be charged for preparing the written record, unless such a charge would effectively prevent the parties from exercising their right.

(5) Inform the parties that the decision is binding, subject only to judicial review. If a party intends to appeal the decision of the SEA Hearing Officer, a letter of intent should be filed with the SEA within ten (10) calendar days subsequent to their receipt of the hearing officer's decision.

F. The decision of the hearing officer is binding, subject only to judicial review, and any action directed by the hearing officer must be initiated immediately.

I SURROGATE PARENT

A. Definitions.

(1) Surrogate Parents
Consistent with the definition outlined in Unit II, I.C., a surrogate parent is a person appointed to act in place of parents when a child's parents or guardians are not known, cannot be located or the child is a ward of the state.

(2) Guardian

(a) For the purposes of this section, the term "guardian" refers to private individuals who have been given the legal custody of a child. If a child is represented by such a person, no surrogate parent is needed.
(b) In cases where institutionalized or parentless children are assigned a legal guardian who is an employee of the state and such individual is appointed because of the position he holds or if he/she exercises the rights of a guardian as a part of this job, a surrogate parent must be appointed for the child.

(3) Foster Parent
Foster parents, for purposes of this section, are individuals assigned by certain state or local agencies to serve as the custodian for a child. A foster parent may volunteer to serve as the surrogate parent for the foster child, provided there is no conflict of interest (reference section I-E of this part).

(4) Ward of the State

(a) For the purposes of this section, a child is a ward of the state when the state has assumed legal responsibility to make decisions concerning the child's education under State Law. Under such circumstances, a surrogate parent must be appointed.
(b) If, however, the State is the custodian of the child but the parent retains the right to make decisions concerning education, the child is not considered to be a ward of the state. In this instance, a surrogate parent would not be required unless it is documented that the parents cannot be located.

B. Determining the Need for a Surrogate Parent.

(1) Any employee of an LEA/agency, SEA, residential school or hospital, any physician, any judicial officer, or any other person whose work involves education or treatment of children, who knows a child needing special education services and knows that the parents or guardians are not known, cannot be located, or that the child is a ward of the state, may file a request for assignment of a surrogate parent. This request shall be made to the LEA/agency involved in the child's educational process.

(2) In an effort to determine if the parent or guardian is, in fact, unknown, cannot be located, or the child is a ward of the state, the LEA/agency shall make a reasonable effort to locate a parent. Efforts to locate parents may include, but are not limited to, attempts to locate them by regular mail, registered or certified mail, phone calls or

visits made to the parents' last known address and to the child's current residence. Efforts to locate parents should be carefully documented.

(3) The LEA/agency shall assign surrogate parents only after careful determination has been made and written documentation thereof that the true parent or guardian is unknown, cannot be located or the child is a ward of the state. The appointment of a surrogate parent may not be utilized to circumvent the procedures for gaining parental consent for evaluation/placement or to replace due process hearings to obtain consent.

After obtaining initial consent for placement or following the decision of a hearing officer for placement to take effect, LEAs/agencies may obtain written parental authorization for the appointment of a surrogate parent to represent the child until such time as the parents appear to represent the child.

(4) In cases where a parent is unresponsive, lives a great distance from their child's school or is incarcerated, the LEA/agency may obtain written authorization from the parent to appoint a surrogate parent to represent the child after the initial consent for placement has been obtained or after the decision for placement to take effect is made by a hearing officer. Parent permission for the appointment of a surrogate must be voluntary, explicitly authorized in writing and revokable at any time. The surrogate, once appointed, may then represent the child until such time as the parent revokes authorization for the child to be represented by the surrogate parent.

C. Appointment of Surrogate Parents

When a handicapped child needs a surrogate parent, the child's school district, in all cases, is responsible except under the following situations:

(1) When a handicapped child who needs a surrogate parent is placed in a foster home, and is presented for placement in a program for the handicapped in the Local Education Agency in which the foster parent resides, that Local Education Agency is responsible for appointing a surrogate parent.

(2) When a handicapped child who needs a surrogate parent is placed by an agency or the court for educational or non-educational reasons in a State Operated Program having educational responsibility under state law, that State Operated Program is responsible for appointing a surrogate parent.

D. Procurement

(1) The LEA/agency shall recruit persons who can serve as surrogate parents, maintain a registry of eligible persons and may compensate or make arrangements for the compensation of such persons, when utilized. (A surrogate is not an employee of the LEA/agency solely because he/she is paid to serve as a surrogate parent.)

(2) Surrogates, as warranted, shall be selected by the district superintendent or his designee compatible with criteria stated herein. The district superintendent or his designee may select qualified persons from outside the territory of the school district.

(3) Surrogate parents may represent the child in all matters relating to the identification, evaluation and educational placement of the child and the provision of a free appropriate public education.

E. Qualifications of Surrogates. Persons selected as surrogates shall:

(1) be adults with no vested interest that would conflict with their primary allegiance to the child they represent,

(2) be thoroughly acquainted with the child's educational needs.

(3) possess an understanding of the cultural and linguistic background of the children they represent.

(4) not be an employee of the LEA/agency involved in the education or care of the child.

F. Persons Disqualified from Serving as Surrogate Parents.

(1) Any person determined to have a conflict of interest, the determination of which must be made on a case by case basis. In general, a person would have a conflict of interest if he/she held a job or other position (e.g., school board member) that might restrict or bias his/her ability to advocate for all of the services required to insure a free appropriate public education for a handicapped child.

(2) No employee of any state or local government agency may serve as a surrogate parent for a child as a part of his/her job with that agency. In assuming the duties of a surrogate, a government employee acting in an official capacity would be assuming the role of parent for a child as an agent of the government and not as a private citizen. However, these people may volunteer their own time to serve as surrogates unless they are subject to a conflict of interest or the nonemployee requirement applies.

(3) No "employee of a public agency which is involved in the education or care" of a child may serve as a surrogate parent. This exclusion applies to all employees of that agency and not only to those employees working directly with a particular child. This exclusion prohibits these people from serving as surrogates under any circumstances, even as volunteers on their own time.

(4) No employee of a private institution may serve as a surrogate parent for any child educated within that respective institution.

G. Removal of a Surrogate Parent

(1) A surrogate parent would be removed when a parent appeared to represent the child, revoked consent (reference Section I-B(4) of this part) or when the child is no longer eligible for special education.

(2) A person serving as a surrogate may resign at any time by submitting his/her resignation in writing to the superintendent or his designee.

(3) In cases where there are disagreements about the choice of a surrogate, a due process hearing may be conducted to challenge the qualifications of the person serving as a surrogate parent.

I. HEARING OFFICERS

A. Recruitment

(1) The LEA/agency shall recruit persons to serve as impartial hearing officers for due process hearings conducted at the local level. A list of persons serving as hearing officers must be maintained; the list shall include a statement of the qualifications of each person who serves.

(2) The SEA shall recruit persons to serve as impartial hearing officers to review appeals to the SEA resulting from hearings conducted at the local level.

(a) Fifty per centum (50%) of the SEA hearing officers will be selected from the State Advisory Council on the Education of the Handicapped and fifty per centum (50%) shall be selected at large from the constituency.

(b) A list of persons serving as hearing officers must be maintained; the list shall include a statement of the qualifications of each person who serves.

B. Qualifications

(1) A person serving as a hearing officer must be at least twenty-one (21) years of age and be a high school graduate or hold an equivalent credential.

(2) A person serving as a hearing officer will be selected without regard to race, sex, creed or handicapping condition.

(3) A person serving as a hearing officer must be unbiased toward any party involved in the hearing.

(4) A person serving as a hearing officer must have no personal or professional interest which would conflict with his/her objectivity in the hearing.

(5) A person serving as a hearing officer must not be an officer, agent, school board official or an employee of a public agency which is involved in the education or care of the child. (A person is not an employee of the public agency because he/she is paid to serve as a hearing officer.)

C. Training

The SEA is responsible for the training of hearing officers. The training will include a review of Federal/state statutes and regulations for the provision of a free appropriate public education for handicapped children; an overview of pertinent litigation; and detailed information regarding procedures prior to, during and after a due process hearing.

APPENDIX C

SUMMARY OF PARENTS' RIGHTS

The following represents a summary of parents' rights regarding evaluation, placement and the provision of a free appropriate public education. Additional rights of parents, however, may be subsumed under other sections of the **FY 1981-83 Annual Program Plan.**

1. Parents may initiate a request for their child to be evaluated.
2. Parents may deny permission for an LEA/agency to evaluate their child. (The LEA/agency, however, may initiate a due process hearing in this event.)
3. Proper notification must be provided to parents. (Reference Item I-D of this part.)
4. Parents may request an independent evaluation. (Subject to the requirements set forth in Section I-E of this part.)
5. Parents may request a list of agencies where independent evaluations may be obtained.
6. Parents may request that their child be placed in a program for the handicapped.
7. Parents may deny permission for an LEA/agency to place a child in a program for the handicapped. (The LEA/agency may request a due process hearing in this event.)
8. Parents have the right to request a due process hearing on substantive or procedural matters relating to the provision of a free appropriate public education for their child. (Related rights are subsumed under Section V-B(2)(a)(b) of this part.)
9. Parents have a right to appeal the decision of a due process hearing conducted at the local level to the SEA.
10. Parents have a right to appeal the decision of the SEA Hearing Officer through the judicial system.
11. Parents have a right to participate in staffing/IEP meetings.
12. Parents have the right to be informed of free/low cost legal services which may be available.
13. Parents have a right to obtain a copy of the child's IEP and to inspect, review and procure copies of all relevant records regarding identification, evaluation, educational placement and the provision of a free appropriate public education to the child. (Related rights are subsumed under the Confidentiality Guidelines.)

UNIT III
The Hearing Officer: General Roles/Responsibilities

GENERAL RESPONSIBILITIES OF THE HEARING OFFICER

In preparing to serve as a Hearing Officer it is your responsibility to:

1. Participate in the training sessions provided by the State Education Agency.
2. Be familiar with State and Federal Legislation regarding the handicapped, particularly the aspects of law presented on pages 1 through 7 of this manual.
3. Keep up-to-date on litigation pertaining to the handicapped, particularly those cases which originate in the South Carolina courts.
4. Know the procedures for "due process" **addressed in State Board of Education Regulation 43-243** (Reference pages 9 through 23 of this manual).
5. Be familiar with the **Procedures for Survey, Screening, Evaluation, Placement, and Dismissal of Children Into/Out of Programs for the Handicapped.** The document was approved by South Carolina State Board of Education and includes the definitions of handicapping conditions recognized by state law and the criteria for placement/dismissal of handicapped pupils into and out of programs. This document was developed to insure that the requirements of P.L. 94-142 are met, relative to protection in evaluation procedures.
6. Have a functional knowledge of the guidelines for "Least Restrictive Environment" and the program models (itinerant, resource and self-contained) recognized by state law. (Reference **State Board of Education Regulation 43-243)**
7. Have a functional knowledge of the State Board of Education Regulations for "Confidentiality." (Reference **State Board of Education Regulation 43-243)**
8. Have a functional knowledge of the State Board of Education Regulations for "Individualized Education Plans" (IEPs). (Reference **State Board of Education Regulation 43-243)**
9. Know the procedures to follow prior to, during and subsequent to a hearing and the appeal procedures. (Reference Units IV and V)
10. Obtain copies of policies, procedures, and forms utilized by the LEA.
11. Obtain information regarding evaluative instruments utilized by the LEA.

GENERAL ROLE OF THE HEARING OFFICER*

A Hearing Officer is:

1. A coordinator — responsible for arranging the hearing and notifying all parties of major activities or events.
2. An information source — responsible for informing all parties of their rights before, during and after the hearing.
3. An uninvolved party in no way involved with the child, parent or school. (Hearing Officers should voluntarily remove themselves from any case in which any conflict of interest exists.)
4. A decision maker — responsible for making reasonable decisions based solely on the evidence and testimony presented during the Hearing.
5. A protector of confidentiality — responsible for maintaining confidentiality of information prior to, during and after the Hearing.

A Hearing Officer is **not:**

—A referral source for lawyers, expert witnesses, etc.

—An enforcer or interpreter of those rights.

—An officer, agent or employee of the school district.

—A person who seeks information outside the hearing which might influence his/her decision.

—A person who discusses confidential information regarding the case in question with persons not directly involved with the case.

GENERAL INFORMATION FOR THE HEARING OFFICER

1. Who may request a hearing?
   The LEA or parents of pupils who are handicapped or suspected of being handicapped.
2. When may a hearing be requested?
   —When the parent/LEA disagree on a proposed evaluation for a child, i.e., parent refuses permission for evaluation, disagrees with the results of an evaluation or parents wish to have pupil evaluated but LEA does not concur, the parent revokes consent for evaluation or, the parent wishes the LEA to pay the expense for an independent evaluation but LEA does not concur.
   —When the parent/LEA disagree on the appropriateness of the proposed placement of a pupil, i.e., the parent refuses permission for placement, disagrees with the type of program model, wishes to have the pupil placed but the LEA does not concur, the parent revokes consent for placement, or the parent wishes the child to be placed in a program other than that recommended by the LEA.
   —When the parent/LEA disagree on a proposed change in educational placement, i.e.,

*Impartial Hearing Officer Training Manual developed by the Ohio Department of Education, Division of Special Education.

the LEA wishes to make placement less/more restrictive, or the parent wishes the LEA to make placement less/more restrictive.

—When the LEA/parent disagree on the appropriateness of the IEP.

—When a parent requests an independent evaluation at public expense, the LEA may initiate a hearing to show that its evaluation is appropriate.

—When the parent wishes to challenge information in educational records to insure that it is not inaccurate, misleading or otherwise in violation of the privacy or other rights of the child.

—When there is disagreement about the qualifications of a surrogate parent.

—On other matters relating to the provision of a free appropriate public education for handicapped pupils.

3. What is the cost of a hearing to parents?

   —Hearings are conducted at no cost to parents except for legal fees and expenses incurred by witnesses.

4. Can a Hearing Officer be held liable for his decision?

   —The Hearing Officer's authority is established by Federal Law. Parents/LEA's have a right to appeal the decision of a Hearing Officer at the local level to the SEA and the right to appeal the decision of the SEA Hearing Officer through the Court of Common Pleas. The possibility of civil action always exists.

   —If a parent initiates an appeal of an SEA Hearing Officer through the Court of Common Pleas, it is also possible that a Hearing Officer from the local or state level would be called to testify. In this event the LEA/SEA would be responsible for payment of any expenses incurred by the Hearing Officer in the capacity of a witness during the proceedings.

5. Can a Hearing Officer request compensation for his services?

   —Yes. The LEA/SEA is responsible for compensating Hearing Officers when compensation is requested. The LEA/SEA is also responsible for clerical assistance, equipment, supplies, etc., required by the Hearing Officer.

6. If Hearing Officers are compensated, is their "impartial" status jeopardized?

   —No. Even though an individual receives payment to serve as a Hearing Officer, such payment does not constitute employment status.

RESPONSIBILITIES OF LEA TO A HEARING OFFICER

1. Assist in locating/providing facilities for hearings.
2. Provide recording equipment, tapes, file folders, a file cabinet, and other necessary equipment/supplies.
3. Provide stenographers and/or other clerical assistance.
4. Provide financial compensation for expenses incurred by Hearing Officers in fulfilling their responsibilities under the law, including travel, lodging, subsistence, etc.

UNIT IV
Procedures Prior To, During And After A Local Education Agency Hearing

PROCEDURES PRIOR TO A HEARING

Procedures for Requesting a Hearing

The LEA Superintendent or his designee will submit a written request for a hearing to a Hearing Officer or will transmit a written request for a hearing from the parents (within 10 calendar days of receiving the request). In cases where parents are unable to communicate through written correspondence, a person representing the parent, or a member of the LEA staff, as determined by the Superintendent may prepare a written request for a hearing in behalf of the parent. The contents of a request for a hearing should include:

Contents of request for a hearing from either party (LEA/parents/surrogates)

—the name of the child, the names, addresses and telephone numbers of LEA contact persons/parents/surrogates.
—a statement regarding the nature of the case in question and specific reasons for the request, i.e., parent refuses permission for the evaluation, parent disagrees with placement recommended by LEA, etc.
—a list of the names and position (or relationship to child) of witnesses anticipated to be present during the hearing.

Contents of request for hearing from LEA

—a copy of the notice informing parents that the LEA is requesting a hearing. (contents should be consistent with requirements outlined in Unit II, section V-A. (1), page 14.
—a statement regarding the LEA's appointment of a surrogate (when parents are not known, cannot be located or the child is a ward of the state).
—a statement regarding the LEA's intention to provide an interpreter (when parents are unable to communicate in English or through normal modes of communication, i.e., parents are deaf).

Contents of request for a hearing from parents

—a statement requesting an open hearing (if they so desire).
—a statement that the parents plan for the child to attend the hearing (if they so desire).
—a statement regarding the need for an interpreter (when parents are unable to communicate in English or through normal modes of communication).

Upon receipt of a request for a hearing the Hearing Officer should:

—record the date on which the request for a hearing is received. (The LEA Hearing Officer should develop a system for logging the dates in which the various steps in the hearing process occur. Under Federal Regulations the hearing, including the issuing of a decision, must be completed within forty-five (45) calendar days after the process is initiated by either party.)

—review the request to determine whether it includes the information previously noted (reference contents of request, page 29). If necessary information has been omitted, it should be documented and obtained by the Hearing Officer.

—determine potential dates for the hearing (provide for at least twenty (20) calendar days notice, unless parties agree otherwise).

Oral Notification

Notify the appropriate LEA person by telephone regarding the disposition of the request for a hearing, establish projected date, time and a location for the hearing, and arrange for a facility, tape recorders and/or for clerical assistance. (Complete the LEA telephone contact sheet, Form 1, page 49.)

—Notify the parents orally, by telephone or home visit, regarding the disposition of the request for a hearing. (In cases where a parent does not have access to a telephone, the Hearing Officer may coordinate the home visit through the LEA. LEA personnel may make the home visit to explain the contents of the notice.) In cases where the projected date, time, and location of the hearing is not reasonably convenient to parents, an acceptable date, time, and location must be determined.

(The Hearing Officer should not discuss facts of the pending case with either party to the hearing.)

In the initial telephone contact/home visit with parents the Hearing Officer should:

—complete the telephone contact sheet (Form 2, page 50).

—complete the Due Process checklist (Form 3, pages 51 and 52).

—explain any item on the Due Process Checklist which the LEA failed to communicate to parents (the hearing rights are particularly important, reference Form 3, item I-B(3) page 51).

—if the date, time or location of the hearing is not acceptable, reschedule or relocate the hearing. (This may require additional telephone contacts prior to written notification.)

Written Notification

Through written notification the Hearing Officer should:

—notify parties of confirmed time, date, and location of the hearing (reference Sample Letters 1 and 2, pages 57 and 58). A copy of this notice should be retained by the Hearing Officer.

—enclose a statement of the hearing rights (Reference Form 3, item I-B(3) page 51.)

—provide a copy of the information sheet regarding witnesses (Form 5, page 54) to each party. Upon receiving the information regarding witnesses from each party, it may be necessary to compel the attendance of witnesses who refuse to testify at the hearing on a voluntary basis.

—mail the written notice by registered or certified mail (return receipt requested).

Compelling Witnesses

Section 300.508(a)(4) of the Federal Regulations for the implementation of Public Law 94-142 affords parties to a due process hearing the right to compel the attendance of witnesses. Through Act 482 of 1980, the General Assembly of the State of South Carolina has provided that "duly appointed Hearing Officers of local school districts and state operated programs shall have the power of subpoena consistent with the requirements and regulations of Public Law 94-142."

The parties to a due process hearing (LEA/parents or surrogates) may request that a Hearing Officer issue a subpoena in order to compel the attendance of any witness who refuses to voluntarily attend a due process hearing for the purpose of providing testimony. When such a request is received, the Hearing Officer should complete the appropriate form (reference Appendix D, Sample Subpoena for LEA Hearing Officer, page 61, or Sample Subpoena for SEA Hearing Officer, page 62, as appropriate.) The forms should be prepared in triplicate and the Hearing Officer should mail the original copy by registered or certified mail (return receipt requested) to the party requesting the subpoena and retain two file copies.

Upon receipt of the subpoena, the party may then present it to the sheriff's office in the county where the witness resides. The subpoena will be served by a law enforcement officer to the witness named in the subpoena. Failure of the witness to comply with the subpoena may result in a penalty as determined by the court.

PROCEDURES DURING A HEARING

Prior to beginning the hearing, the Hearing Officer should:

—check the facility to insure that the physical arrangement of furniture is appropriate and facilitates maximum opportunity for communication among the persons present.

—check the recording devices to insure that they are in working order and/or insure that a stenographer is present.

Opening the Hearing

In opening the hearing, the Hearing Officer should provide the following information:

—a statement of the time, date and location of the hearing.

—a statement of the specific parties involved (child's name, parents' name, LEA representatives, etc.)

—a statement of the date on which the request for a hearing was filed and the dates and methods of notifying parties regarding the schedule for the hearing.

—a statement regarding the nature of the case.

—a request that each person present identify themselves and their position or relationship to the case in question (i.e., mother, school psychologist, attorneys for parties, etc.).

—a statement of the order in which the parties (LEA/parents/surrogates) will present evidence and testimony.

—a statement that the parties (LEA/parents/surrogates) will have an opportunity to question witnesses representing the opposing party.

—a statement that the Hearing Officer will pose questions to any person participating in the hearing as is deemed necessary.

—present any other information deemed appropriate at this time.

Example of opening remarks:

This is a due process hearing being held on January 25, 1980 in the conference room of Central Elementary School. I am Susan Martin, Hearing Officer for this case in which the matter of an appropriate educational placement for Johnny Jones is the issue. Johnny is a fourth grade student at Central Elementary School, he was born on June 3, 1967. The request for a hearing was filed by Mr. Charles Thompson, Coordinator of Programs for the Handicapped of Oak Valley School District #1 on December 18, 1979. In the request for a hearing, Mr. Thompson indicated that the district's staffing committee had recommended that Johnny be placed in a self-contained program for educable mentally handicapped pupils but that Mrs. Jones, Johnny's mother, was opposed to this placement and had refused to sign the necessary forms for the placement to take effect.

After reviewing the request for a hearing, I determined that Mrs. Jones had been duly notified regarding the district's request for a hearing. I, then, contacted Mr. Thompson to arrange for a facility and to establish several potential dates and a location for the hearing. I also contacted Mrs. Jones to verify that the district had properly informed her of her rights and to review the hearing procedures with her. During that telephone contact, Mrs. Jones and I established the date, time and location for the hearing. Mrs. Jones decided that she would prefer a closed hearing and did not wish to have Johnny present at this hearing.

Following the telephone contacts with Mr. Thompson and Mrs. Jones, I provided written notification to them confirming the date, time and location for the hearing. I also included a copy of the hearing rights as information to the parties, and a form on which to provide me with a list of the witnesses anticipated to be in attendance and those whose attendance must be compelled.

Today's proceedings are being recorded and the tape will be made available to either party upon request. It is necessary that each person present state his name and position or relationship to Johnny Jones so that we will have an accurate record of the persons participating.

(parties present state name and position/relationship to child)
Charles Thompson, Coordinator of Programs for the Handicapped
Jane Scott, Johnny's classroom teacher
Bill Smith, School Psychologist
Ted Wilson, Attorney for School District #1
Mrs. Nancy Jones, Johnny's mother
Mr. John Jones, Johnny's father
Mr. James Hamilton, Attorney for Mr. and Mrs. Jones

I would like this hearing to remain informal, however, we need to proceed in an orderly fashion. Since the hearing was requested by the school district, we will hear their evidence first; at the conclusion, Mr. and Mrs. Jones, you and your representatives will have an opportunity to question the representatives of the school district. Subsequently, you will present your evidence and at the conclusion, the district will have an opportunity to ask questions.

Throughout the hearing, I will be asking questions when necessary. I would like each party to present any written information at the time you give testimony in order that it may be appropriately entered as evidence.

Evidence and Testimony

—Establish the procedure for receiving evidence and testimony. The recommended procedure is for the party requesting the hearing (complainant) to present their evidence and testimony first, followed by an opportunity for the other party (respondent) to ask questions (cross-examine). The respondent then presents evidence and testimony and the complainant may ask questions.

—Any written information which is entered in evidence should be marked as an exhibit of the party introducing the evidence. (Number or letter each accordingly, i.e., exhibit #1 — complainant, exhibit #1 — respondent, or exhibit A — complainant, exhibit A — respondent.)

—Prohibit the introduction of any evidence which was not previously disclosed to the other party at least five (5) calendar days prior to the hearing, unless all parties agree otherwise.

—Insure that each party is appropriately identified as speakers change to enable the stenographer or person transcribing the tape to accurately present the comments of each participant.

—Periodically check recording devices.

—Maintain control over the proceedings (as Hearing Officer, it is your responsibility to prohibit parties representing opposing views from pursuing unnecessarily hostile forms of questioning, lines of questioning not relevant to the issue and redundant testimony).

—If presentation of evidence and testimony becomes inordinately lengthy, the Hearing Officer may reconvene the hearing at a date, time and place mutually agreeable to the parties.

Closing the Hearing

When all evidence and testimony have been presented and there are no further questions, the Hearing Officer will conclude the proceedings. In closing the hearing, the Hearing Officer should:

—inform parties that his/her decision will be based upon the evidence presented at the hearing.

—advise parties that they may receive a copy of the transcript upon request.

—describe the appeal procedures.

—advise parties that the decision will be binding unless an appeal is made to the SEA within ten (10) calendar days after the parties receive the decision (unless an extension of time in which to file a written administrative review request is granted by the state level administrative reviewing officer).

—advise the parties that a written decision will be issued within five (5) calendar days after the hearing.

Example of closing remarks:

Does anyone have other information to present? (no negative response). Then, it is my responsibility to make a decision based on the evidence and testimony presented here. After I read the reports submitted by each party and review the transcript of today's proceedings, I will make a decision. I am charged with an obligation to render a fair and impartial decision, based solely on the facts as presented.

I will submit a written decision to you and I will also contact you by telephone to make certain that you understand the reasons for my decision. You will receive the decision within the next five (5) calendar days. The reports and transcript of the hearing will be placed with Johnny's permanent file and will be available to you in its entirety upon request.

Should either the administration of Oak Valley School District #1 or you, Mr. and Mrs. Jones, be in opposition to the decision I render, an appeal may be directed to the South Carolina Department of Education, Office of Programs for the Handicapped within ten (10) calendar days (unless an extension of time in which to file a written administrative review request is granted by the state level administrative reviewing officer), after you receive notification. If an appeal is not initiated within that time, then my decision will be binding to all parties.

Should you choose to appeal this case to the SEA and subsequently disagree with the decision of the Hearing Officer at the State level, you may then initiate civil action; otherwise, the decision of the State Hearing Officer will be binding to all parties.

If there is no further discussion, the hearing is adjourned.

PROCEDURES AFTER A HEARING

Following a hearing, the Hearing Officer should:

—set up a folder to include the transcript, all correspondence received or sent, and any records/reports entered as evidence.

—request the LEA to have the hearing record typed when either party requests a written transcript.

—review the transcript with consideration of all evidence which is relevant and material.

—weigh the evidence and make a decision.

Making a Decision

The Hearing Officer has considerable latitude in his authority to make decisions. However, according to a **A Step-By-Step Resource Manual for Hearing Officers** published by the National Association of State Directors of Special Education, there are three primary limitations in the decision making process:

1. **The issue.** The decision of the Hearing Officer must be limited to the specific complaint(s) which is the issue to be resolved. For example, if the issue is a question of the appropriateness of the LEA's evaluation, the Hearing Officer should not attempt to resolve the issue by determining the proper category of handicapping condition. The decision must relate only to the issue(s).

2. **The evidence.** The Hearing Officer's decision must be based upon the evidence and testimony presented during the hearing. It is not within the purview of the Hearing Officer's authority to seek information regarding the case in question outside of the context of the hearing. Additionally, information known to the Hearing Officer but which was not introduced as evidence during the hearing cannot be considered.

3. **Public agency prerogative.** Public agencies may exercise their prerogative in certain matters regarding the provision of a free appropriate public education without violating parents' rights. For example, if the child requires placement in a resource program for the educable mentally handicapped within the LEA, the Hearing Officer does not possess the authority to decide the specific class in which the child will be placed. Similarly, while the need for placement in a private residential school may be at issue and the Hearing Officer's decision is that this placement is deemed necessary, the Hearing Officer does not possess the authority to determine the specific private facility where the child should be placed.

Issuing a Decision

Within five (5) calendar days following the hearing, a decision must be issued, unless both parties agree otherwise during the hearing. The decision must be presented orally and in writing by registered or certified mail (return receipt requested) to the parties (LEA/parents/surrogates).

Oral notification regarding the decision may be provided through a telephone contact, a home visit, a meeting, etc.; documentation of the date, person(s) spoken to, nature and contents of the conversation should be maintained. The bottom section of forms 1 and 2, pages 49 and 50 may be utilized or modified for this purpose). If parents are deaf or if English is not the primary language of the home, it will be necessary for the LEA to arrange for an interpreter to translate the decision.

Written notification of the decision must be provided in the primary language of the home by registered or certified mail (return receipt requested).

Format for the Decision

The following information should be included in the written decision:

I. Background information

1. statement of date, time and location of the hearing.
2. purpose of the hearing.
3. listing of the names of the parties involved in the hearing and the names and position/relationship to child of witnesses in attendance
4. listing and brief description of each written item entered as evidence.
5. any other pertinent information regarding the hearing as deemed appropriate.

II. Findings

1. summary of relevant evidence (facts).
2. points challenged/defended (when issues are not clear).

III. Decision and Rationale

1. specific statement of decision.
2. reasons for the decision.

IV. Appeal Procedures

(Reference Unit II, section VI, pages 17 and 18)

When the decision has been issued, the Hearing Officer shall organize all materials regarding the case in question and the hearing and submit this information to the LEA. The LEA will store and maintain this information consistent with State Board of Education regulations regarding Confidentiality.

UNIT V
SEA APPEAL PROCEDURES

INITIATING AN APPEAL

In cases where the LEA/SOP/parent/surrogate disagrees with the decision of the Hearing Officer at the local level, the case may be appealed to the State Education Agency. An appeal must be filed by the LEA/parent/surrogate within ten (10) calendar days following receipt of the LEA Hearing Officer's decision (unless an extension of time in which to file a written administrative review request is granted by the state level administrative reviewing officer); otherwise, the decision is binding to both parties.

Parties appealing the decision of the LEA Hearing Officer must submit the appeal in writing to the Office of Programs for the Handicapped of the State Department of Education. Where parents are unable to communicate through written correspondence, a person representing the parent, or a member of the LEA staff, as determined by the Superintendent, may prepare the appeal in behalf of the parent. Parties submitting an appeal to the SEA must insure that the appeal is in writing and that it includes the following:

1. An electronic verbatim or written transcript of the LEA hearing. If an electronic verbatim transcript is of such poor quality that the SEA Hearing Officer would be effectively prevented from conducting the review, the SEA Hearing Officer may request a written transcript. (A request for a specific extension of the timelines set forth in Section VI-B of Unit II may be granted by the Hearing Officer in order for a written transcript to be completed.)
2. A statement of the decision following the LEA hearing, the specific points being appealed, copies of all items entered as evidence, and the name and address of the parents if the LEA is appealing the decision. The appellant may also include written argument.

It should be noted also that any party (LEA/SOP/parent/surrogate) filing an appeal must notify the other party of such and provide a copy of the appeal, including written arguments to the other party.

SEA RESPONSIBILITIES

Upon receiving an appeal, the SEA shall:

— Transmit the appeal to an SEA Hearing Officer by registered or certified mail (return receipt requested).

—Submit a written notice to both parties, (LEA/parents/surrogates) by registered or certified mail (return receipt requested) acknowledging receipt of the appeal. The notice will include the name and address of the SEA Hearing Officer. It will also inform both parties, that a brief (written argument) may be submitted to the SEA Hearing Officer. Parties will also be reminded that if they choose to submit a brief to the SEA Hearing Officer, they must also provide a copy to the opposing party.

—Assist the SEA Hearing Officer in locating and scheduling the use of an adequate facility when a hearing is necessary.

—Provide electronic recording equipment and/or a stenographer when a hearing is necessary.

—Provide clerical assistance for typing the decision and transcript of the hearing when necessary.

RESPONSIBILITIES OF SEA HEARING OFFICER

Conducting The Review

It is important for the SEA Hearing Officer to develop a system for logging the dates on which various steps in the review process are completed inasmuch as the review process, including the issuing of a decision, must be completed within thirty (30) calendar days from the date the SEA received the appeal. The thirty (30) day timeline for completion of the SEA appeal is required by Federal Regulations. Other timelines were established by the Department of Education in order to provide consistency in state level appeals. Either party, however, may request an extension in time provided "just cause" for the request can be documented by the party requesting the extension.

After receiving the appeal, the SEA Hearing Officer shall:

1. Examine the entire hearing record.

   The hearing record should include the verbatim transcript (electronic or written) of the hearing and all written reports introduced as evidence. The SEA Hearing Officer shall review the hearing record from the standpoint of the facts presented by each witness, the points challenged and defended and the relevant facts supported by written evidence included as exhibits.

   This information should be weighed against the stated findings and the rationale in the decision issued by the LEA Hearing Officer. In the interest of both parties, the SEA Hearing Officer should examine the decision of the LEA Hearing Officer with consideration toward the issue(s), the evidence and the public agency prerogative as discussed on page 34.

2. Insure that the LEA hearing was conducted consistent with due process procedures. (Reference form 4, page 53).

3. Review the brief (written argument) submitted by either or both parties.

   The SEA Hearing Officer must insure that each party receives a copy of the brief submitted by the opposing party prior to his making a decision.

4. Determine the need for a hearing to afford parties an opportunity to present oral argument and/or to seek additional information.

In cases where a review of the hearing record indicates that the hearing was conducted consistent with procedural due process, the rationale and the LEA Hearing Officer's decision is clearly supported by the evidence (testimony and exhibits) introduced at the hearing and the written briefs fail to "show cause" for any further consideration of the issue in question, the SEA Hearing Officer may issue his decision following the review (reference page 17, Section VI, D (4)).

In the event that the SEA Hearing Officer has serious concerns or questions which cannot be reconciled through the review process, a hearing to receive oral argument may be warranted. In this case the Hearing Officer is seeking clarification on specific points and the oral argument should be limited to those points as specified by the SEA Hearing Officer.

In rare instances, the SEA Hearing Officer may determine that a hearing is necessary to receive additional information. For example, suppose the issue at an LEA hearing was the appropriateness of the LEA's evaluation, but the parent had never requested an independent evaluation. After reviewing the hearing record, the SEA Hearing Officer does not believe that the facts presented at the hearing indicate conclusively that the LEA evaluation was appropriate. The SEA Hearing Officer may request that an independent evaluation be administered and conduct a hearing for the purpose of receiving the results.

PROCEDURES PRIOR TO A HEARING

Notification

When a hearing is necessary, the SEA Hearing Officer must notify both parties orally (reference forms 1 and 2, pages 49 and 50; form 4, page 53; form 5, page 54 and the sample letters, pages 57 and 58).

Written notification shall afford both parties at least ten (10) calendar days notice prior to the hearing. The notice should:
—Specify the date, time and location of the hearing, which should be reasonably convenient to all parties.
—Provide a description of the hearing rights (reference Form 4, item 3 (a-i), page 53).

Compelling Witnesses

Reference Unit IV, the section regarding compelling witnesses, page 31.

PROCEDURES DURING A HEARING

Reference Unit IV, pages 31 through 33 for information regarding procedures during a hearing. you will note that the opening/closing remarks, the time lines described and certain other items must be modified when applied to hearings conducted by an SEA Hearing Officer.

PROCEDURES SUBSEQUENT TO A HEARING

The Decision

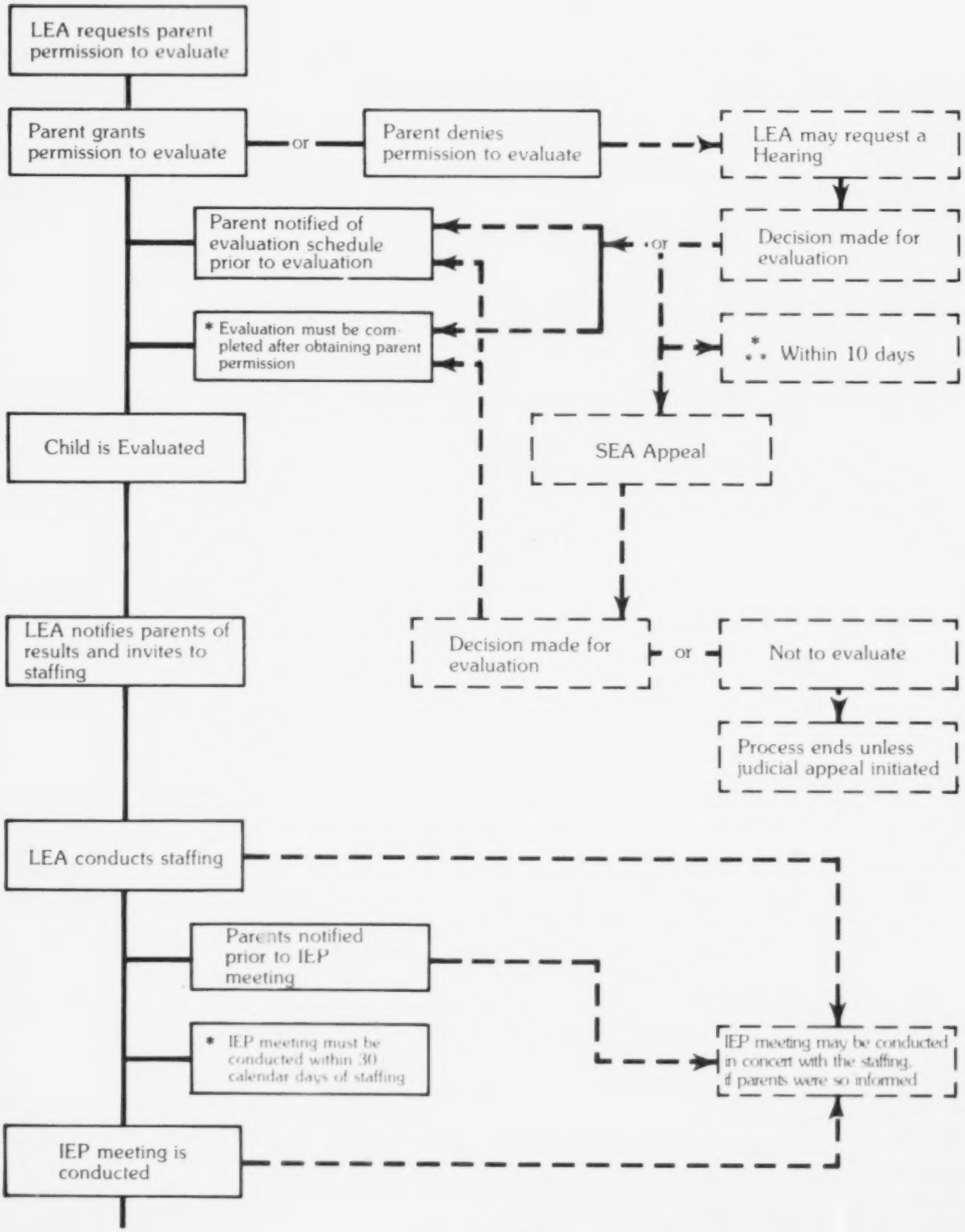
After the review of a hearing, the Hearing Officer shall:

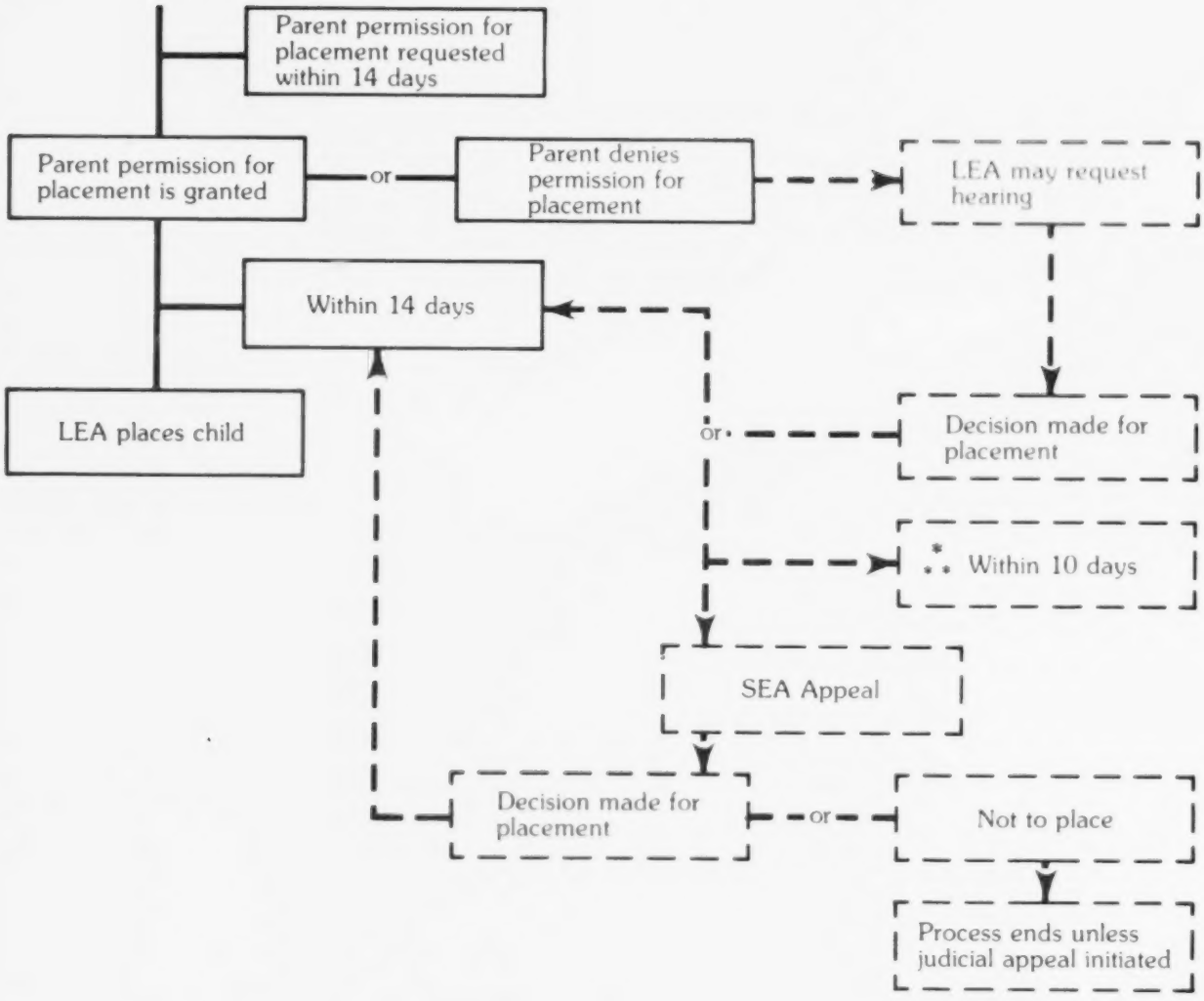
1. Make an independent decision based solely on the evidence and testimony presented at the hearing.
2. Notify the parties of the decision (reference Unit IV, page 35 for suggested format).
3. Provide a copy of the written findings to the parties.
4. Inform the parties of their right to obtain a verbatim record of the hearing (reference Unit II, Section VI-E(4)(a) and (b), page 18).
5. Inform parties of their right to appeal. (Parties aggrieved by the findings may initiate civil action. Urge parties to file a letter of intent to the SEA within ten (10) calendar days subsequent to their receipt of the Hearing Officer's decision if they plan to initiate civil action.)

APPENDIX A

Chart 1

LEA EVALUATION AND PLACEMENT PROCESS


LEA requests parent permission to evaluate
Parent grants permission to evaluate
or
Parent denies permission to evaluate
LEA may request a Hearing
Parent notified of evaluation schedule prior to evaluation
or
Decision made for evaluation
* Evaluation must be completed after obtaining parent permission
* Within 10 days
Child is Evaluated
SEA Appeal
LEA notifies parents of results and invites to staffing
Decision made for evaluation
or
Not to evaluate
Process ends unless judicial appeal initiated
LEA conducts staffing
Parents notified prior to IEP meeting
* IEP meeting must be conducted within 30 calendar days of staffing
IEP meeting may be conducted in concert with the staffing, if parents were so informed
IEP meeting is conducted



**Unless an extension of time in which to file a written administrative review request is granted by the state level reviewing officer.

Chart 2

LEA HEARING PROCEDURES

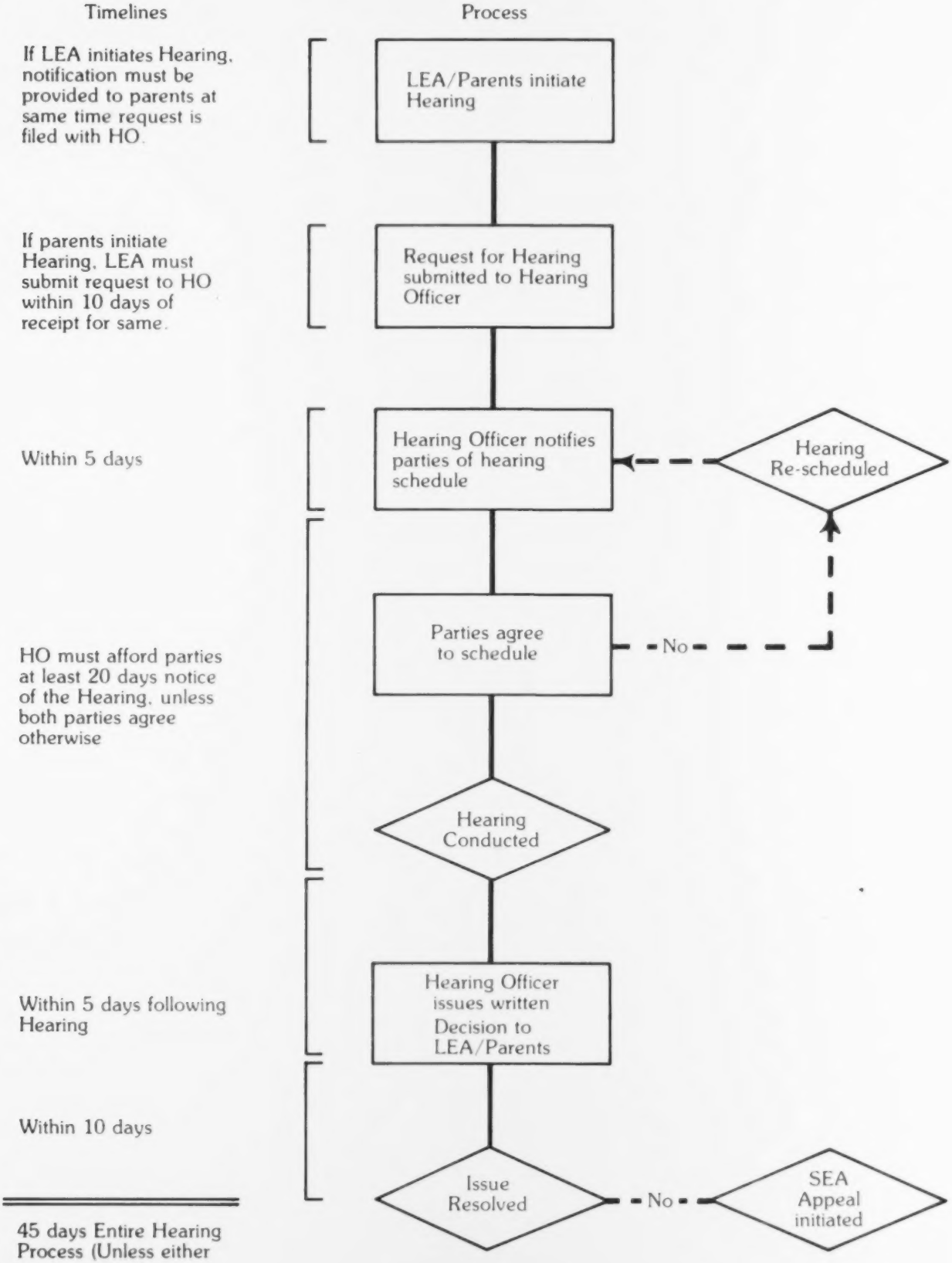
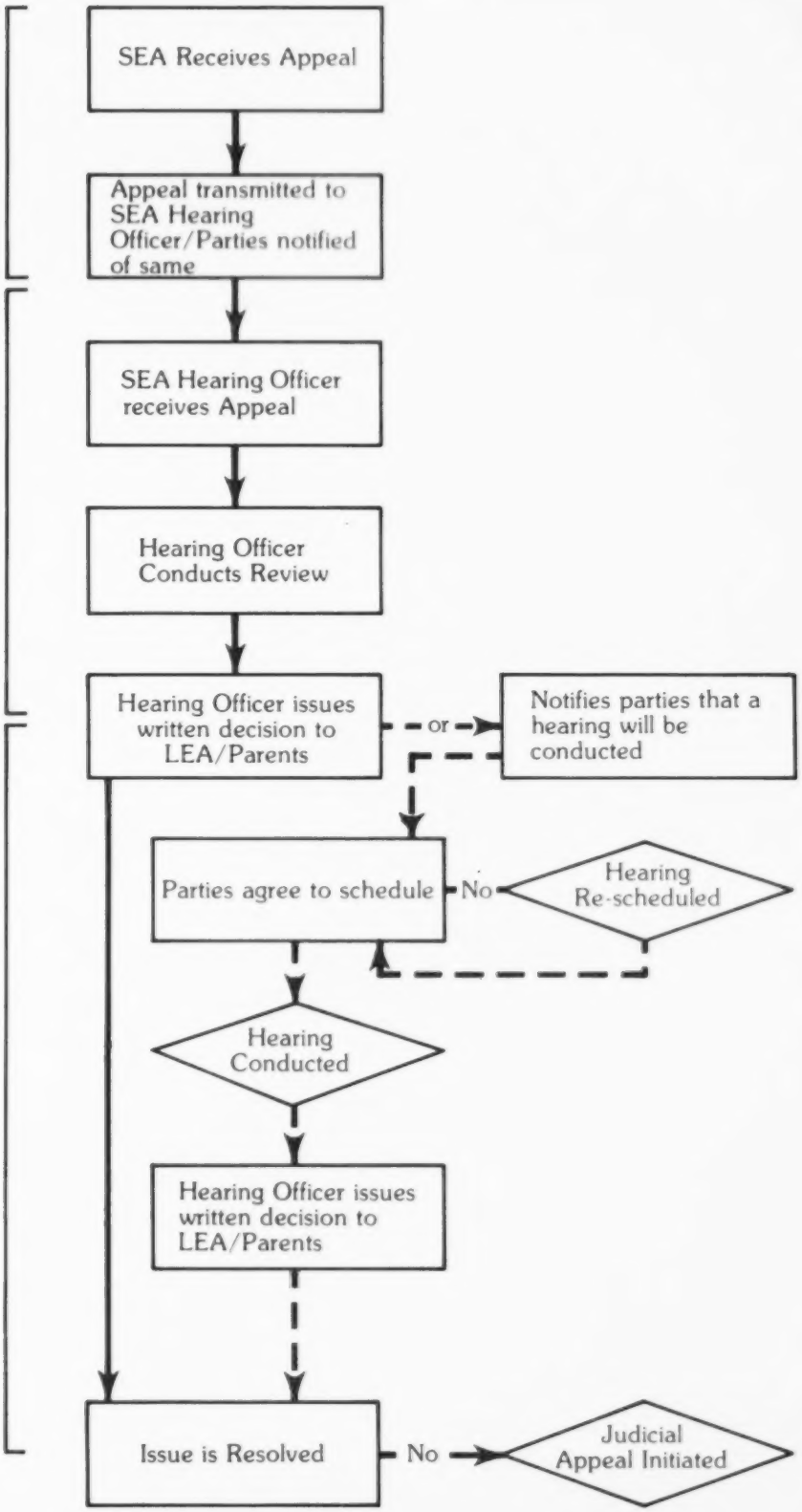

Timelines
Process
If LEA initiates Hearing, notification must be provided to parents at same time request is filed with HO.
LEA/Parents initiate Hearing
If parents initiate Hearing, LEA must submit request to HO within 10 days of receipt for same.
Request for Hearing submitted to Hearing Officer
Within 5 days
Hearing Officer notifies parties of hearing schedule
Hearing Re-scheduled
HO must afford parties at least 20 days notice of the Hearing, unless both parties agree otherwise
Parties agree to schedule
No
Hearing Conducted
Within 5 days following Hearing
Hearing Officer issues written Decision to LEA/Parents
Within 10 days
Issue Resolved
No
SEA Appeal initiated
45 days Entire Hearing Process (Unless either party requests an extension)

Chart 3

SEA APPEAL PROCEDURES

Timelines

Process


SEA Receives Appeal
Appeal transmitted to SEA Hearing Officer/Parties notified of same
SEA Hearing Officer receives Appeal
Hearing Officer Conducts Review
Hearing Officer issues written decision to LEA/Parents
or
Notifies parties that a hearing will be conducted
Parties agree to schedule
No
Hearing Re-scheduled
Hearing Conducted
Hearing Officer issues written decision to LEA/Parents
Issue is Resolved
No
Judicial Appeal Initiated

HO must afford parties at least 10 days notice of the hearing, unless both parties agree otherwise

Within 10 days following Decision

30 days Entire Appeal Process (unless either party requests an extension)

APPENDIX B

APPENDIX B

FORM 1

TELEPHONE CONTACT WITH LEA

Hearing Regarding _____
(name of child)

School District _____

Phone Number _____

Date _____ Individual Contacted _____

This is _____. I am serving as Hearing Officer in the matter
(name)
concerning _____.
(name of child)

I am calling for two reasons. First, I want to confirm that you have fulfilled the due process requirements in this matter. Secondly, I would like to ask a few questions in order to obtain the information I need to make the arrangements for the hearing. (Remind the LEA that any evidence to be introduced must be disclosed to the parents at least five (5) days prior to the hearing.)

a. How many witnesses do you plan to have in attendance? _____
b. Do you have a conference room large enough to accommodate _____ people? If not, do you have any recommendations for a location for the hearing? _____
c. I would like to conduct the hearing on _____. Is that date convenient with you? _____ (If not, establish potential dates.)
(date)

I will send you a letter which will summarize our discussion. Thank you for your cooperation.

Follow-up Contacts (as appropriate):

1. Name: _____ Date _____ Purpose _____

_____

2. Name: _____ Date _____ Purpose _____

_____

3. Name: _____ Date _____ Purpose _____

_____

FORM 2

TELEPHONE CONTACT WITH PARENTS/SURROGATES

Hearing Regarding _____
(name of child)

School District _____

Phone Number _____

Date _____ Individual Contacted _____

This is _____. I am serving as Hearing Officer in the matter con-
(name)

cerning _____ _____.
(name of child)

I am calling for two reasons. First, I would like to determine if you have been fully informed of your rights. Secondly, I would like to ask a few questions in order to obtain the information I need to make the arrangements for the hearing.

Procedural Questions

a. Have you been informed of the following information? _____ (Reference Due Process Checklist — Form 3).
b. Do you plan to have or have you had an independent educational evaluation conducted for your child? _____
c. Is English the primary language used in your house? _____
d. Do you wish to have the hearing open? _____
e. Do you plan to have your child present during the hearing? _____
f. I would like to conduct the hearing on _____ at _____. Is that time convenient for
(date) (time)
you? _____ (If no, establish potential dates.)
g. Does meeting at the _____ create any problems for you as a location for the
(location)
hearing? _____
h. How many witnesses do you plan to have in attendance? _____

(Remind the parents that any evidence they plan to introduce must be disclosed to the LEA at least five (5) days prior to the hearing.)

I will send you a letter which will summarize our discussion. Thank you for your cooperation.

Follow-up Contacts (as appropriate):

1. Name: _____ Date _____ Purpose _____

_____

2. Name: _____ Date _____ Purpose _____

_____

3. Name: _____ Date _____ Purpose _____

_____

FORM 3

DUE PROCESS CHECKLIST

Note: Indicate **Yes, No** or **Not Applicable** for each of the following items.

	Yes	No	N/A	Comments
I. Hearings				
(A and B (1) applies only if hearing is initiated by LEA)				
A. Notice provided to parents on same day as request was filed.				
B. Notice includes:				
(1) copy of original notice regarding proposed action				
(2) availability of records				
(3) description of Hearing Rights				
a. to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children;				
b. present evidence and confront, cross-examine, and compel the attendance of witnesses;				
c. to appeal the decision resulting from the due process hearing;				
d. to prohibit the introduction of any evidence that has not been disclosed to the other party at least five (5) calendar days prior to the hearing;				
e. to obtain a written or electronic verbatim record of the hearing;				
f. to obtain written findings of fact and decisions;				
g. to have the child, who is the subject of the hearing, present during the hearing;				
h. to open the hearing to the public (Hearings will be closed unless otherwise requested by parents.);				

	Yes	No	N/A	Comments
i. to have the child remain in the present educational placement during pendancy of the proceedings. (In cases which involve initial admission to public school, the child with the consent of parents must be placed in the public school program.).				
(4) sources of free/low cost legal services				
II. Information provided by LEA to parents				
A. Evaluation/Placement				
(1) prior notices in native/understandable language				
(2) consent requested				
(3) description of instruments				
(4) confidentiality (information regarding records)				
(5) sources of independent evaluations				
(6) staffing				
(7) IEP meeting				
(8) least restrictive environment				
(9) information regarding hearing/appeal				

FORM 4

CHECKLIST FOR SEA HEARING OFFICER REVIEW

I. Prior to Hearing	Yes	No	Comments
1. Both parties were notified orally by LEA Hearing Officer.			
2. Both parties were provided written notification by LEA Hearing Officer.			
3. Parties were notified of the following Hearing Rights:			
a. to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children;			
b. present evidence and confront, cross-examine, and compel the attendance of witnesses;			
c. to appeal the decision resulting from the due process hearing;			
d. to prohibit the introduction of any evidence that has not been disclosed to the other party at least five (5) calendar days prior to the hearing;			
e. to obtain a written or electronic verbatim record of the hearing;			
f. to obtain written findings of fact and decisions;			
g. to have the child, who is the subject of the hearing, present during the hearing;			
h. to open the hearing to the public (Hearings will be closed unless otherwise requested by parents.);			
i. to have the child remain in the present educational placement during pendancy of the proceedings. (In cases which involve initial admission to public school, the child with the consent of parents must be placed in the public school program.).			
4. Subpoena power exercised upon request of either party.			
5. Timelines were honored.			

FORM 5

INFORMATION ON WITNESSES

Re: _____
(name of Child)

Date of Hearing/Appeal (circle as appropriate): _____

Please complete the following information and return by _____
(suggest return within seven (7) calendar days after parties receive information)

1. Voluntary witnesses: (The following persons have agreed to provide testimony in the due process hearing/appeal on the matter in question)

NAME POSITION ADDRESS

a) _____

b) _____

c) _____

d) _____

e) _____

2. Witnesses to be compelled: (To be completed when necessary)

The following person(s) has/have been contacted and has/have refused to provide testimony on a voluntary basis in the due process hearing/appeal on the matter in question. I consider their testimony to be relevant and crucial to the outcome of the hearing/appeal; therefore, I am requesting that a subpoena be issued to the person(s) named below:

_____
Signature of person requesting subpoena

NAME POSITION ADDRESS

a) _____

Reason for requiring attendance: _____

b) _____

Reason for requiring attendance: _____

APPENDIX C

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SAMPLE LETTER 1

WRITTEN NOTIFICATION TO LEA

Name _____

Address _____

Date _____

Dear _____.

This letter will serve to summarize our phone conversation of ____(date)____ regarding the arrangements for the hearing on the matter of ____(student's name)____. As I stated during our conversation, the purpose of our discussion was to obtain information necessary for the hearing, and to verify compliance of the local education agency with procedural safeguards.

We discussed the introduction of written evidence and agreed that any evidence you plan to present must be disclosed to the parents/surrogates at least five (5) days prior to the hearing. It will also be helpful for you to provide me with the list of witnesses who will be presenting testimony on behalf of the LEA.

In addition, we agreed that, since English is the primary language of the home, there will be no need for an interpreter or translator. Also, the parents have requested that the hearing be ____(open/closed)____.

Finally, we agreed to hold the hearing at ____(location)____ on ____(date)____ at ____(time)____. The parents have also agreed to this time and place.

I am enclosing a copy of the rights of parties relative to due process hearings which I have also provided to the parents/surrogates as information.

Thank you for your cooperation. If you need to contact me in reference to the proceedings, you may do so at ____(phone no.)____ from ____(hours)____ to _____ on any weekday. Once again, I will not be able to discuss the facts of this case with you, only matters relative to procedures and arrangements for the hearing.

Sincerely,

_____

(Hearing Officer)

SAMPLE LETTER 2

WRITTEN NOTIFICATION TO PARENTS

Name _____

Address _____

Date _____

Dear _____.

This letter will serve to summarize our phone conversation of (date) regarding the arrangements for the hearing on the matter of (student's name). As I stated at the beginning of our recent conversation, the purpose of our discussion was two-fold: 1) to determine if the (public agency) has fully complied with the due process requirements, and 2) to obtain information necessary to plan for the hearing.

After discussing the due process provisions on a point-by-point basis, I am satisfied that the school district has adequately informed you of your rights. In addition, we discussed the introduction of evidence, the presentation of witnesses, and your plans for an independent educational evaluation.

Let me remind you again that any evidence you plan to introduce must be provided to the LEA at least five (5) days prior to the hearing. Also, please complete the attached form listing the witnesses you intend to have present.

In addition, we agreed that, since English is the primary language of the home, there will be no need for an interpreter or translator. Also, as we agreed, the hearing will be (open/closed).

Finally, we agreed to hold the hearing at (location) on (date) at (time). The school district has also agreed to this time and place.

As information, I am enclosing a copy of the hearing rights accorded to parties in due process hearings. (see form 4 item 3 (a)-(i), page 53)

Thank you for your cooperation. If you need to contact me in reference to the proceedings, you may do so at (phone no.) from (hours) to _____ on any weekday. Once again, I will not be able to discuss the facts of this case with you, only the matters relating to procedures and arrangements for the hearing.

Sincerely,

_____

(Hearing Officer)

APPENDIX D

SAMPLE SUBPOENA FOR LEA HEARING

STATE OF SOUTH CAROLINA)
)
COUNTY OF _____)
_____.)
)
Complainant.)
)
vs.)
)
_____.)
)
Respondent.)
)
_____)

BEFORE _____
(Local Education Agency Hearing Officer)

SUBPOENA AD TESTIFICANDUM

TO: _____(Name)_____, _____(Title if applicable)_____
(Address)_____

You are hereby strictly required and firmly enjoined that, all business being laid aside, and excuses ceasing, you do appear before (Name of Hearing Officer), Local Education Agency Hearing Officer appointed to conduct the hearing herein pursuant to Public Law 94-142, at _____ (Location of hearing)_____, _____(Address of hearing site)_____, _____(City)_____, South Carolina, on the _____ day of _____, 198__, at _____ o'clock ____.M. to testify the truth according to your knowledge in the above captioned matter.

Herein fail not on the pain of the consequences that may fall thereon.

WITNESS (Name of Hearing Officer), Local Education Agency Hearing Officer at _____(City)_____, South Carolina, on the _____ day of _____, 198__.

_____
(Type name)

_____
(Hearing Officer's Signature)

(Name of person requesting subpoena)_____

(Title (Attorney at Law, Principal, Parent, etc.))_____

(Representing (Attorney for School District, Parent of _____))_____

SAMPLE SUBPOENA FOR SEA HEARING

STATE OF SOUTH CAROLINA)
)
COUNTY OF _____)
_____.)
)
Complainant,)
)
vs.)
)
_____.)
)
Respondent.)
)
_____)

BEFORE _____
(State Education Agency Hearing Officer)

SUBPOENA AD TESTIFICANDUM

TO: _____(Name)_____, _____(Title if applicable)_____
(Address)_____.

You are hereby strictly required and firmly enjoined that, all business being laid aside, and excuses ceasing, you do appear before (Name of Hearing Officer), State Education Agency Hearing Officer appointed to conduct the hearing herein pursuant to Public Law 94-142, at _____ (Location of hearing)_____, _____(Address of hearing site)_____, _____(City)_____, South Carolina, on the _____ day of _____, 198__, at _____ o'clock ____.M. to testify the truth according to your knowledge in the above captioned matter.

Herein fail not on the pain of the consequences that may fall thereon.

WITNESS (Name of Hearing Officer), South Carolina State Department of Education Hearing Officer at (City), South Carolina, on the _____ day of _____ 198__.

_____
(Type name)

_____
(Hearing Officer's Signature)

(Name of person requesting subpoena)

(Title (Attorney at Law, Principal, Parent, etc.))

(Representing (Attorney for School District, Parent of _____))

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